# TRANSCRIPT OF RECORD

# Supreme Court of the United States

OCTOBER TERM, 1933

## No. 680

ISAAC GROSS AND JOEL GROSS, PARTNERS AS GROSS & GROSS, SOLICITORS FOR COMPLAINANT IN CHANCERY, PETITIONERS,

vs.

IRVING TRUST COMPANY, TRUSTEE CROSBY STORES, INC., BANKRUPT

## No. 681

J. S. S. WEISMAN AND JOHN MILTON, RECEIVERS IN CHANCERY OF CROSBY STORES, INC., PETITIONERS,

vs.

IRVING TRUST COMPANY, TRUSTEE CROSBY STORES, INC., BANKRUPT

## No. 682

ISAAC GROSS AND JOEL GROSS, PARTNERS AS GROSS & GROSS, AND WILLIAM HARRIS, SOLICITORS FOR RECEIVERS IN CHANCERY, PETITIONERS,

vs.

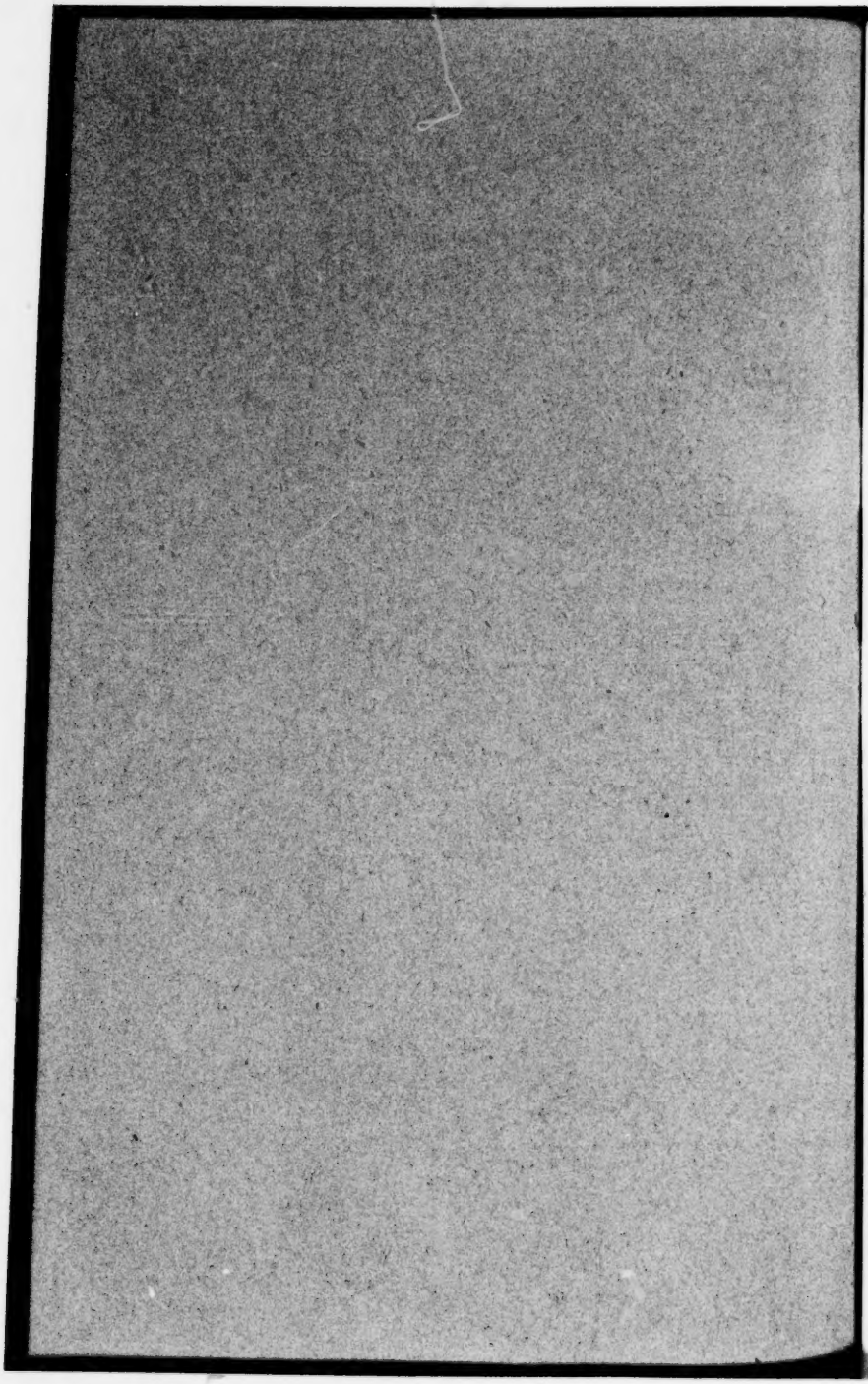
IRVING TRUST COMPANY, TRUSTEE CROSBY STORES, INC., BANKRUPT

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONS FOR CERTIORARI FILED FEBRUARY 10, 1933

CERTIORARI GRANTED MARCH 13, 1933

**(37,377, 37,378, 37,379)**



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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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**Petition of Trustee for Order Directing Return of Moneys.**

(Filed July 1, 1932.)

IN THE

# District Court of the United States

FOR THE DISTRICT OF NEW JERSEY.

| | |
|---|---|
| IN THE MATTER<br>*of*<br>CROSBY STORES, INC.,<br>Bankrupt. | In Bankruptcy.<br>Petition. |

*To the Honorable Judges of the District Court of the United States for the District of New Jersey:*

The petition of the undersigned respectfully sets forth:

1. That it is the duly appointed, qualified and acting trustee of the above named bankrupt.

2. That on or about the 13th day of October, A. D. 1931, a bill was filed in the Court of Chancery of New Jersey by the Perfection Garment Co., a corporation, against Crosby Stores, Inc., having for its object the granting of an injunction by the said Court restraining the said Crosby Stores, Inc., from exercising its franchise as a corporation and for the appointment of a receiver pursuant to an Act of the New Jersey Legislature entitled "An Act Concerning Corporations (Revision of 1896)," and the acts supplemental thereto and amendatory thereof.

3. Thereafter on the 13th day of October, A. D. 1931, an order was made appointing Messrs. John Milton and J. S. S. Weisman, receivers for the said Crosby Stores,

Inc., a copy of which order is hereto annexed and made a part hereof, marked Schedule "A."

The said receivers qualified and took possession of the assets and property of the defendant corporation located within the State of New Jersey, which assets consisted of goods and merchandise located in a department store operated by the defendant corporation in Jersey City and Perth Amboy, New Jersey.

4. That on the 14th day of October, A. D. 1931, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York against the Crosby Stores, Inc., and such proceedings were had on said petition that on the 30th day of October, A. D. 1931, the said Crosby Stores, Inc., was duly adjudicated a bankrupt, and on the 1st day of December, A. D. 1931, said petitioner, Irving Trust Company, was duly appointed trustee of said bankrupt and duly qualified and has ever since been and is now acting as such trustee.

5. That pursuant to an order to show cause made on the 19th day of November, A. D. 1931, by the United States District Court for the Southern District of New York, upon which a hearing was had on the first day of December, A. D. 1931, before the said Court, the said assets and property of said bankrupt as contained in said five stores were sold to Harry B. Cohen for $37,000.00, and on the 7th day of December, A. D. 1931, an order was made approving said sale and directing the transfer of said property to said purchaser, and on the 18th day of December, A. D. 1931, said purchaser did pay to the Irving Trust Company as trustee the said sum of $37,000.00 and did demand proper instruments of transfer so to be placed in possession of the said property so sold to him by your petitioner.

6. That said purchaser was placed in possession of the contents of all of said stores excepting said two stores in New Jersey.

*Petition of Trustee for Order Directing Return of Moneys.*

7. That in order to enable your petitioner to place said purchaser in possession of said New Jersey stores, your petitioner did procure an order from said District Court of the United States for the Southern District of New York requiring the said John Milton and J. S. S. Weisman, the said receivers appointed by the said New Jersey Court of Chancery, and William Harris and Isaac Gross, the counsel of the said receivers, to show cause before the said Court why they should not be required to turn over the assets and property of said bankrupt in the possession of said receivers, and why they should not be required to account to said Court, which order to show cause having been duly served upon said respondents, said Court made an order, a copy of which is hereto attached and made a part hereof, marked Schedule "B", wherein said respondents were in substance directed forthwith to turn over to your petitioner as trustee in bankruptcy aforesaid, the assets and property of the said bankrupt in their possession or under their control as such receivers, and said counsel were directly to apply to said bankruptcy court for allowances for their services rendered to said receivers, which said last mentioned order was duly served upon said receivers and their counsel.

Notwithstanding the service made of said last mentioned order, the said respondents having failed to obey the same, your petitioner did, on the 18th day of December, A. D. 1931, file its petition in the District Court of the United States for the District of New Jersey and did procure from said Court an order requiring the said John Milton and J. S. S. Weisman, individually and as receivers aforesaid, and William Harris and Isaac Gross, to show cause before said Court on December 31, 1931, why they should not be directed to forthwith turn over to your petitioner, as trustee aforesaid, the property and assets of said bankrupt excepting such moneys as they shall have necessarily expended in and about the preservation of the assets and property of said bankrupt prior to the filing of the invol-

untary petition in bankruptcy against said bankrupt, and restraining the said respondents from taking any proceedings in the said New Jersey Court of Chancery upon a certain order to show cause bearing date the 9th day of December, 1931, a copy of which order to show cause is hereto attached and made a part hereof, marked Schedule "C", which order to show cause was directed to your petitioner as trustee in bankruptcy, and which order to show cause had for its object the making of an order approving the account and report of said receivers and granting of compensation to said receivers and their said counsel.

8. That on the 14th day of December, 1931, your petitioner learned that the said receivers and their said counsel had procured an order from the said Court of Chancery of New Jersey approving the report and account of said receivers and awarding the following fees:

| | |
|---|---|
| John Milton and J. S. S. Weisman, as receivers jointly | $ 6,000.00 |
| Gross & Gross and William Harris, as solicitors of the receivers jointly besides their taxed costs | 4,000.00 |
| Gross & Gross, as solicitors of the complainant | 350.00 |
| | $10,350.00 |

A copy of said order is attached hereto and made a part hereof, marked Schedule "D." Copies of the checks evidencing said payments are annexed hereto and made a part hereof, marked Schedule "E."

9. Pursuant to a petition and order to show cause dated December 18th, 1931, annexed hereto and made a part hereof, marked Schedule "F-I," on the 22nd day of December, A. D. 1931, the said District Court of the United States for the District of New Jersey, made an order, a copy of

which is hereto annexed and made a part hereof, marked Schedule "F," which, in substance, provided that said John Milton and J. S. S. Weisman, individually and as receivers aforesaid, and the said William Harris and Isaac Gross, jointly and severally turn over to your petitioner, as trustee, the property and assets of the bankrupt then or theretofore in their possession, custody or control, excepting such moneys as they shall necessarily have expended in and about the preservation of the assets and property of said bankrupt prior to the date of the filing of the involuntary petition in bankruptcy against said bankrupt, and restraining said persons from interfering with said trustee in the taking of possession of the property of said bankrupt and restraining all of said persons from disposing of any moneys heretofore received by them pursuant to the order of the said Court of Chancery dated December 14th, A. D. 1931, wherein compensation for services alleged to have been rendered was awarded, which said order your petitioner is informed and verily believes was duly served upon said John Milton, J. S. S. Weisman, William Harris and Isaac Gross.

10. Petitioner further alleges that there has not been turned over to your petitioner the moneys belonging to the said bankrupt estate now in the possession of said receivers appointed by the Court of Chancery of New Jersey, which the receivers allege they have paid out to the said receivers and their said counsel in accordance with an order made by the Court of Chancery of the State of New Jersey awarding said sums to the receivers and counsel as compensation for their services.

11. Your petitioner is informed and believes that in the report and account, a copy of which is attached hereto and made a part hereof, marked Schedule "G," filed by said receivers in said Court of Chancery on December 9th, A. D. 1931, it is alleged that there was then in the pos-

session or control of said receivers cash on hand and in banks derived from sales made at said Jersey City, New Jersey, store—$15,628.53, and cash on hand and in bank derived from sales made at said Perth Amboy, New Jersey, store—$3,161.77.

12. Your petitioner is informed and believes that the said receivers filed a final report and account in said Court of Chancery on February 11th, 1932, a copy of which is attached hereto and made a part hereof, marked Schedule "H."

13. That your petitioner's right to have turned over to your petitioner said cash on hand and in banks and to account to your petitioner for the assets and property of said bankrupt estate is disputed by said John Milton, J. S. S. Weisman, William Harris and Isaac Gross.

14. Petitioner further alleges that the payment by said receivers of the sum of $10,350.00 to the receivers and counsel for compensation is utterly null and void and was in violation of the provisions of the Bankruptcy Act of the United States, Revision of 1898 and the amendments supplemental thereto and amendatory thereof, and it was the duty of the said receivers appointed by the Court of Chancery and their counsel to apply to the Bankruptcy Court for compensation for services rendered by them, which may have enured to the benefit of the bankrupt estate.

Wherefore, your petitioner prays that an order may be made requiring John Milton and J. S. S. Weisman individually and as receivers aforesaid, and William Harris and Isaac Gross summarily to turn over to your petitioner the assets of the said bankrupt estate including and not by way of limitation the following sums of money awarded to the receivers and to their counsel by the Court of Chancery of New Jersey as compensation for their services

and to file their account with the United States District Court for the District of New Jersey:

| | |
|---|---|
| John Milton and J. S. S. Weisman, as receivers jointly | $ 6,000.00 |
| Gross & Gross and William Harris, as solicitors of the receivers jointly, besides their taxed costs | 4,000.00 |
| Gross & Gross, as solicitors of the complainant | 350.00 |
| | $10,350.00 |

And that your petitioner may have such other and further relief as may be equitable and just in the premises.

And your petitioner will ever pray, &c.

IRVING TRUST COMPANY,

By JOSEPH T. STEARNS,
Assistant Secretary,
Petitioner.

(Petition was duly verified.)

## Schedule "A," Annexed to Petition.

IN CHANCERY OF NEW JERSEY.

Between

PERFECTION GARMENT COMPANY,
a corporation,
Complainant,

*and*

CROSBY STORES, INC.,
a corporation,
Defendant.

On Bill, &c.
Order Appointing Receiver.

This matter coming on to be heard on an order to show cause made herein on September 3, 1931, and duly continued and brought on for hearing on this day by service of notice provided for in the order of continuance made on October 9, 1931, and it appearing to the Court that the said defendant, Crosby Stores, Inc., is unable to meet its current and maturing obligations out of available funds or by the honest use of its credit, and that it is insolvent within the purview of an Act of the Legislature of the State of New Jersey, entitled: "An Act Concerning Corporations (Revision of 1896)", and the supplements thereto and amendments thereof, and Gross & Gross appearing for and on behalf of the complainant herein, and William Harris and Samuel Roessler on behalf of intervening creditors, and the Court having heard all the arguments presented for and against the granting of the relief prayed for in the bill of complaint, and it appearing to the Court that the relief prayed for should be granted and a receiver of the said defendant corporation appointed for the reasons aforesaid, it is on this 13th day of October, 1931, on motion of Gross & Gross, solicitors and of counsel with complainant.

*Schedule "A," Annexed to Petition.*

ORDERED, ADJUDGED AND DECREED, that the defendant corporation is unable to meet its current and maturing obligations out of available funds or by the honest use of its credit, and it is insolvent within the purview of an Act of the Legislature of the State of New Jersey, entitled, "An Act Concerning Corporations (Revision of 1896)", and the supplements thereto and amendments thereof; and it is further

ORDERED, that an injunction issue in accordance with the prayers of the bill of complaint herein filed and pursuant to the provisions of an Act of the Legislature of the State of New Jersey, entitled: "An Act Concerning Corporations (Revision of 1896)" and the amendments thereof and supplements thereto; and the said defendant corporation, its officers, agents, servants and employees, be and they are hereby enjoined and restrained from exercising any of the corporate privileges and/or franchises of the said defendant corporation, and from collecting or receiving any debts owing to the said defendant, and from paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to the receiver hereby appointed, and that the defendant corporation, its officers, agents, servants and employees as aforesaid, are hereby ordered and directed to refrain and desist from doing, and from attempting to do, any of the acts above named; and it is further

ORDERED, that John Milton of Jersey City, New Jersey and J. S. S. Weisman of Hoboken, New Jersey, be and are hereby appointed receivers for the said defendant corporation, with the full possession of all of the powers, and charged with the performance of all duties defined and described by law, and especially by an Act of the Legislature of the State of New Jersey, entitled: "An Act Concerning Corporations (Revision of 1896)", and the Amendments thereof and supplements thereto; and it is further

*Schedule "A," Annexed to Petition.*

ORDERED, that the said receivers, before entering upon their duties as such, do take the oath prescribed by law, and do enter into a bond to the Chancellor of the State of New Jersey, in the sum of Twenty-five thousand Dollars, which bond shall be conditioned for the faithful performance of their duties as such receivers, and shall be approved as to the form and sufficiency of the surety thereby by any of the Special Masters of this Court, and shall be filed with the Clerk of this Court; and it is further

ORDERED, that each and every of the officers, directors, agents, attorneys and employees of the said defendant, Crosby Stores, Inc., and all other persons, be and they hereby are required and commanded forthwith, upon the demand of the said receivers or of his duly authorized agent or representative, to turn over and deliver to the said receivers or to their duly constituted representatives, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys, evidences of indebtedness, and any and all other property and records in the possession of the said defendant, or subject to its control; and it is further

ORDERED, that the said defendant, Crosby Stores, Inc., its officers, directors, stockholders, agents, employees, representatives and attorneys, creditors and mortgagees, and each of them, and all other persons claiming to act by, through or under the defendant, and the said defendant, and its officers, directors, stockholders, agents, employees, representatives, attorneys and creditors, be and they and each of them are hereby enjoined and restrained from interfering in any manner with the possession of the receiver, or with their management of any part of the property of the said defendant corporation, or from interfering in any manner with the full and complete discharge of their duties by the said receiver, or from instituting or prosecuting or continuing with the prosecution of any suit, action or proceeding at law, in equity or in bankruptcy against the said

defendant company, or against any property in its possession, or in the possession of the receivers hereby appointed, and from proceeding upon any judgment or execution or other process issued in any suit or proceeding against the said defendant, Crosby Stores, Inc., or against its property, or against the receivers or against property in the possession of the said defendant, or in the possession of the said receivers without leave of this Court first had and obtained; and it is further

ORDERED, that the said receiver and agent are hereby authorized, in their discretion, to continue to manage, operate and conduct the business of the said defendant for a period of thirty days from the date hereof, with full authority to carry on and manage, operate and conduct the said business in their discretion, subject to the supervision of this Court, and to that end to buy and sell merchandise, supplies, equipment, and all things necessary for the proper conduct of the said business, for cash as may be deemed advisable by the said receiver and to hire and employ such employees and other hire as they may deem advisable, to consider and determine which of the contracts, leases or other contractual arrangements between the defendant and any and all other persons or corporations they will renounce or adopt, and to adopt and perform such of said contracts, leases or other contractual arrangements of the said defendant as they may deem desirable or necessary in the conduct of the defendant's business, or in the furtherance of its interests, or in the interests of its stockholders and creditors, but no such contract, lease or other contractual arrangement shall be deemed to have been adopted or ratified by the said receivers except upon written notice by him to that effect.

Respectfully advised,

JNO. J. FALLON,
V. C.

E. R. WALKER,
C.

## Schedule "B," Annexed to Petition.

At a Stated Term in Bankruptcy, held at the offices of the Hon. Peter B. Olney, Jr., Referee in Bankruptcy, 19 Rector Street, in the Borough of Manhattan, City of New York, dated the 14th day of December, 1931.

Present:

Hon. Peter B. Olney, Jr.,
Referee in Bankruptcy.

In the Matter
*of*
Crosby Stores, Inc.,
Bankrupt.

The Irving Trust Company, as Trustee herein, having moved this Court by an order to show cause dated December 11th, 1931, predicated upon its petition duly verified the same day, requiring John Milton and J. S. S. Weissman to show cause why they should not be compelled to forthwith turn over, all and singular, the property in their possession to the Trustee in Bankruptcy, and why they should not be directed to account to this Court as Receivers in Chancery, and why William Harris and Isaac Gross should not be required to make applications for allowances to them for services rendered to the said Receivers in Chancery, and for such other and further order and relief as to the Court may seem just and proper, and the said order to show cause having duly come on to be heard, and after reading and filing the same, and the petition upon which the said order to show cause was predicated, and after hearing Arthur Leonard Ross, Esq., of counsel for the Trustee, in support of said motion, and no one appearing in opposition thereto, and after reading and filing the affidavits of service of Abraham Golub, upon the respondents herein, and due deliberation having been had thereon, it is

*Schedule "B," Annexed to Petition.*

On motion of Arthur Leonard Ross, Esq., attorney for the trustee herein,

ORDERED that John Milton and J. S. S. Weissman be and they and each of them are hereby authorized and directed to forthwith turn over to the Irving Trust Company, as Trustee herein, all and singular, the property, assets and effects of the bankrupt above named, in their possession or under their control as Receivers in Chancery, and it is further

ORDERED that John Milton and J. S. S. Weissman file their and each of their report and account under oath, as Receivers in Chancery, with the undersigned Referee in Bankruptcy, and it is further

ORDERED that the said William Harris and Isaac Gross be and they are hereby directed to file all applications for allowances to them for services rendered to the Receivers in Chancery, with the undersigned Referee in Bankruptcy; and it is further

ORDERED that John Milton, J. S. S. Weissman, William Harris and Isaac Gross and each of them, their representatives, agents, counsel and attorneys, be and they hereby are jointly and severally enjoined and restrained from proceeding with the order to show cause issued out of the Chancery Court in New Jersey in a certain action wherein the Perfection Garment Co., a corporation, is the complainant, and Crosby Stores, Inc., the bankrupt herein, is the defendant, dated December 9th, 1931, which said order to show cause was directed to the Irving Trust Company, as Trustee herein and from taking any action or proceeding before the said Court of Chancery, in connection with the report and account of the Receivers in Chancery in the said action, and the application for allowances to counsel or any of them.

(Sgd.) PETER B. OLNEY, JR.,
Referee in Bankruptcy.

## Schedule "C," Annexed to Petition.

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| Between<br>PERFECTION GARMENT COMPANY,<br>a corporation,<br>Complainant,<br>*and*<br>CROSBY STORES, INC., a corporation,<br>Defendant. | On Bill, &c.<br>Order to Show Cause on Receivers' Petition, Report and Account. |

Upon reading and filing the duly verified petition, report and account of John Hilton and J. S. S. Weisman, receivers herein, in which the said receivers pray, amongst other things, that their said report and account may be passed, allowed and approved and allowances made to them for their services as receivers herein, as well as allowances made to Gross & Gross and William Harris, as solicitors and counsel in this matter for services rendered herein, all as set forth and prayed for in said petition, report and account of said receivers, and the said receivers in and by their said petition, report and account further praying the instructions of this court as to the disposition to be made by them of the assets and property in their hands as such receivers, and what indemnity they should obtain for their protection against liabilities incurred by them in the progress of said receivership; and it further appearing to the court in and by said petition, report and account that the said defendant corporation has, since the appointment of the receivers herein, been adjudged bankrupt by the United States District Court for the Southern District of New York, and that the Irving Trust Company has been appointed trustee in bankruptcy of said defendant corporation, and that said trustee is alleged to have sold all of the

assets, including those in the hands of the said receivers herein;

It is on this 9th day of December, 1931, on motion of Gross & Gross, solicitors of said receivers,

Ordered, that the Irving Trust Company, as Trustee in Bankruptcy of the said Crosby Stores, Inc., show cause before the Chancellor, at the Chancery Chambers, in the City of Jersey City, on the 14th day of December, 1931, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the said report and account of the said receivers herein should not be passed, approved and allowed, and the allowances of the said receivers and of their said counsel and of the solicitors of complainant, for their services rendered herein fixed and determined by this court, and directed to be paid, and what other instructions should be given to the said receivers herein with respect to the matters in said petition, report and account set forth, as therein prayed for, or such other instructions as may be proper; and it is further

Ordered, that a copy of this order and of the petition, report and account of the said receivers, upon which the same is founded (which need not be certified) be served upon said Irving Trust Company, Trustee in Bankruptcy of the said Crosby Stores, Inc., within one day from date hereof, either within or without the State of New Jersey, which shall be deemed good and sufficient service hereof.

Respectfully advised,

Jno. J. Fallon,
V. C.

E. R. Walker,
C.

## Schedule "D," Annexed to Petition.

IN CHANCERY OF NEW JERSEY.

Between

PERFECTION GARMENT CO.,
a corporation,
Complainant,

*and*

CROSBY STORES, INC.,
a corporation,
Defendant.

On Bill, &c.

Order on Receivers' Petition, Report and Account.

This matter coming on to be heard upon an order to show cause made herein on December 9th, 1931, and returnable on this date, in the presence of WILLIAM HARRIS and ISAAC GROSS, of counsel with the receivers; and J. S. S. WEISMAN and JOHN MILTON, the receivers herein; and it appearing to the Court that said order to show cause has been duly served upon Irving Trust Company, as trustee in bankruptcy of said Crosby Stores, Inc., in the manner in said order provided; and no one appearnig on behalf of the Irving Trust Company, as trustee in bankruptcy of Crosby Stores, Inc., objecting to the making of this order; and the Court having examined the petition, report and account of the receiver herein, and no one appearing in opposition to the approval and allowance of the same; and it further appearing to the Court that the said report and account of the receivers should be passed, approved and allowed; and the Court having carefully gone into the services rendered by the receivers and their solicitors aforesaid and being of the opinion that the allowances hereinafter referred to should be made; it is on motion aforesaid, on this 14th day of December, 1931

*Schedule "D," Annexed to Petition.*

ORDERED, that the receivers' report and account be and the same is hereby passed, approved and allowed and in all things confirmed. And it is further

ORDERED, that there be allowed and paid by the receivers herein, out of the funds in their hands, to said John Milton and J. S. S. Weisman as receivers herein jointly the sum of Six Thousand ($6,000) Dollars, as and for their services as receivers herein. And it is further

ORDERED, that there be allowed and paid to Gross & Gross and William Harris, solicitors of the receivers herein, jointly the sum of $4,000, besides their costs to be taxed. And it is further

ORDERED, that there be allowed and paid to Gross & Gross, solicitors of the complainant, a counsel fee of Three Hundred and Fifty ($350) Dollars, as solicitors of the complainant herein; together with their costs to be taxed.

Respectfully advised,

JOHN J. FALLON,
V. C.

E. R. WALKER,
Chancellor.

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**Schedule "E," Annexed to Petition.**

(Copies of checks. Not necessary to print.)

## Schedule "F-1," Annexed to Petition.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

| | |
|---|---|
| IN THE MATTER *of* CROSBY STORES, INC., Bankrupt. | Petition and Order to Show Cause in Ancillary Proceedings. |

Upon the petition of the Irving Trust Company, as trustee in bankruptcy of Crosby Stores, Inc., the bankrupt above named which petition was duly verified the 16th day of December, 1931, and upon all the papers, pleadings and proceedings heretofore had in said matter in the District Court of the United States for the Southern District of New York and in this court on motion of Bilder & Bilder, attorneys of said trustee, it is on this 18th day of December, A. D. 1931,

ORDERED, that John Milton and J. S. S. Weissman, individually and as receivers for the stockholders and creditors of said Crosby Stores, Inc., the said bankrupt, heretofore appointed such receivers by the New Jersey Court of Chancery and William Harris and Isaac Gross show cause before the Judges of this Court at the courtrooms thereof in the Lefcourt-Newark Bldg., #11 Raymond Blvd., in the City of Newark, County of Essex and State of New Jersey on Monday, the 21st day of December, 1931, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard why an order should not be made ordering and directing said John Milton and J. S. S. Weissman individually and as receivers aforesaid to comply with the order of the Hon. Peter B. Olney, Referee in Bankruptcy, dated

*Schedule "F-1," Annexed to Petition.*

December 14, 1931, made in the above stated matter by said Referee in the District Court of the United States for the Southern District of New York and why they should not be directed forthwith to turn over and deliver to said Irving Trust Company as trustee of said bankrupt all and singular all the property, assets and effects of said bankrupt now and/or heretofore in their or either of their possession, custody or control, excepting such moneys as they shall have necessarily expended in and about the preservation of the assets and property of said bankrupt prior to the date of the filing of the involuntary petition in bankruptcy against said bankrupt and why as to such expended moneys they should not account to said trustee before said Referee in Bankruptcy in said matter in the United States District Court for the Southern District of New York and why they should not be enjoined and restrained from interfering with said trustee in the taking of possession of the said assets and property belonging to said bankrupt estate and why said trustee should not have such other and further relief in the premises as the Court may deem just and proper; and it is further

ORDERED that the said John Milton and J. S. S. Weissman individually and as receivers as aforesaid and William Harris and Isaac Gross and each of them, their agents, servants and attorneys, representatives, counsel and attorneys be and they are hereby jointly and severally enjoined and restrained until the further order of the Court from taking any proceedings upon the order to show cause granted by the New Jersey Court of Chancery in a certain cause wherein the Perfection Garment Co., a corporation, is the complainant and Crosby Stores, Inc., the bankrupt herein, is the defendant, which order to show cause is dated December 9th, 1931, and which order to show cause is directed to the Irving Trust Company as trustee herein and from taking any action or proceeding before said Court of Chancery in connection or relation to the report and

account of said receivers in said suit in said Court of Chancery and the application for allowances to said receivers and to counsel or any of them; and it is further

ORDERED, that the said William Harris and Isaac Gross show cause at the time and place aforesaid why they should not be required to make application for such compensation as they may claim for services rendered to said receivers to said Referee in Bankruptcy in said matter; and it is further

ORDERED that a copy of this order and the annexed petition which need not be certified but which may be certified by the petitioner's solicitors to be true copies be served upon said respondents on or before the 18th day of December, 1931.

GUY L. FAKE,
U. S. D. J.

*Schedule "F-1," Annexed to Petition.*

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

IN THE MATTER
*of*
CROSBY STORES, INC.,
Bankrupt.

*To the Honorable Judges of the United States for the District of New Jersey:*

The petition of the IRVING TRUST COMPANY, the Trustee in Bankruptcy, respectfully shows to this Honorable Court and alleges:

FIRST: That on the 1st day of December, 1931, at a meeting of creditors duly held at the offices of the Hon. Peter B. Olney, Jr., Referee in Bankruptcy in and for the Southern District of New York, your petitioner was appointed Trustee in Bankruptcy of the property, assets and effects of the bankrupt above named, and thereafter your petitioner duly qualified as such Trustee in the manner and form prescribed by law.

SECOND: That theretofore and on the 4th day of October, 1931, a petition praying for the involuntary adjudication of the bankrupt above named was duly filed in the office of the Clerk of the United States District Court for the Southern District of New York, and thereafter and on the 30th day of October, 1931, an order adjudging the Crosby Stores, Inc., an involuntary bankrupt within the purview of the National Bankruptcy Act was duly made herein.

*Schedule "F-1," Annexed to Petition.*

THIRD: Upon information and belief that prior to the filing of the involuntary petition herein and within four months, the Chancery Court of New Jersey in a certain action wherein the Perfection Garment Company, a corporation, was the complainant, and the bankrupt was the defendant, and after a hearing duly held on the said bill in Chancery, and the answer of the defendant was entered, a decree on October 13th, 1931, in accordance with the prayer of the bill of complaint, adjudging the bankrupt to be unable to meet its current and maturing obligations out of available funds or by the honest use of its credit, and that it was insolvent within the purview of an act of the Legislature of the State of New Jersey entitled "An Act Concerning Corporations" (Rev. of 1896) and the laws supplemental thereto and amendatory thereof.

FOURTH: Upon information and belief that by a said decree entered on October 13th, 1931, John Milton of Jersey City, N. J. and J. S. S. Weissman of Hoboken, N. J., were appointed receivers of the bankrupt corporation and that the said Milton and Weissman are now acting as such Receivers.

FIFTH: Upon information and belief that the said Receivers have retained William Harris, Esq., of Newark, N. J. and Isaac Gross, Esq., of Jersey City, N. J., as attorneys for the Receivers.

SIXTH: Upon information and belief that the said Receivers continued the business of the bankrupt which was located at Jersey City and Perth Amboy, N. J.

SEVENTH: That the bankrupt operated a chain of five department stores and that the other three are located at Scranton, Pa., Niagara Falls, N. Y. and Pittsfield, Mass.

EIGHTH: That on December 1st, 1931, at a meeting of creditors the assets herein including the two New Jersey

stores were offered for sale pursuant to an order to show cause duly issued out of the United States District Court for the Southern District of New York, dated the 19th day of November, 1931, and that thereafter and on the 7th day of December, 1931, the United States District Court for the Southern District of New York, made an order directing the sale of the bankrupt's assets to one Harry B. Cohen.

NINTH: That thereafter and on the 9th day of December, 1931, on motion of Gross & Gross, solicitors of the said Receivers, said Receivers procured an order to show cause directed to your petitioner as Trustee, why the report and account of the said Receivers in Chancery should not be passed, approved and allowed and the allowances of the said Receivers and of their said counsel and of the solicitors of the complainants for their services rendered, should not be determined by the said Chancery Court and directed to be paid, and what indemnity, if any, your petitioner should be obliged to give for the protection of the Receivers against liabilities incurred by them in the progess of the said Receivership and for other relief.

TENTH: That your petitioner must have immediate possession so as to comply with the order of the United States District Court for the Southern District of New York which authorizes and directs the Trustee to deliver the property to the said Harry B. Cohen. Unless delivery can be made of the said property and the said Chancery Receivers directed to turn over the same, this estate will be seriously damaged.

ELEVENTH: Your petitioner also believes that the said JOHN MILTON and J. S. S. WEISSMAN should be required to account to the Federal Court of their stewardship as Chancery Receivers and that their counsel should be required to apply to the Federal Court for their allowances as such counsel.

*Schedule "F-1," Annexed to Petition.*

TWELFTH: That thereupon your petitioner applied to the Hon. Peter B. Olney, Jr., Referee in Bankruptcy in charge of this proceeding in the Southern District of New York, for an order to show cause dated December 11th, 1931, requiring the said John Milton, J. S. S. Weissman, William Harris and Isaac Gross to show cause why they should not be required to forthwith turn over, all and singular, the property in their possession to your petitioner as Trustee in Bankruptcy, and why they should not be required to account in the Federal Court and for such other relief, and the said orders to show cause, your petitioner is informed, were duly served upon the said respondents, but on the return day the said respondents did not appear, and the Hon. Peter B. Olney, Jr., Referee in Bankruptcy, made an order granting the said relief; a copy of the said order is hereto annexed and made part of this petition as though fully set forth herein at length, which said order was also duly served on said respondents.

THIRTEENTH: That annexed hereto is a certified copy of the order approving your petitioner's bond as Trustee herein.

FOURTEENTH: That although your petitioner, through its counsel, again demanded that the Chancery Receivers comply with the said order of the Referee, Peter B. Olney, Jr., John Milton, one of the said Chancery Receivers herein, notified your petitioner's counsel that he would not comply with the provisions of the said order of December 14th, 1931, to turn over the property to the Trustee, nor to account to the Federal Court for the reason that Vice Chancellor Fallon directed otherwise.

FIFTEENTH: That your petitioner is unable to consummate the sale made by it pursuant to the order of December 7th, 1931, and your petitioner is in serious danger by reason thereof, and the progress of this estate is being seri-

ously interfered with, delayed, hindered and damaged and the rights and remedies of creditors are being seriously affected. Your petitioner appeals to the Ancillary powers of this Court to aid it in enforcing the orders of the United States District Court for the Southern District of New York.

WHEREFORE, your petitioner prays an order of this Court directing John Milton, J. S. S. Weissman, Isaac Gross and William Harris to show cause why the Receivers in Chancery should not comply with the order of the Hon. Peter B. Olney, Jr., dated December 14, 1931, and why they should not be required to forthwith turn over, all and singular the property of the bankrupt now in their possession or under their control, and why they should not be required to report and account to the Federal Courts, and why the said Receivers should not be enjoined and restrained from interfering with the Irving Trust Company, as Trustee herein, in the exercise of its duties as such Trustee in connection with the property in the State of New Jersey, and for such other and further order and relief in the premises as to this Court may seem just and proper.

Dated, December 16, 1931.

IRVING TRUST COMPANY,
Trustee.

By NEWTON D. ALLING,
Assistant Vice-President,
Petitioner.

(Order approving bond of Trustee annexed.)

## Schedule "F," Annexed to Petition.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF NEW JERSEY.

| | |
|---|---|
| IN THE MATTER *of* CROSBY STORES, INC., Bankrupt. | In Bankruptcy. Order. |

This matter being opened to the Court by David H. Bilder and Arthur L. Ross of counsel with Irving Trust Company as trustee in bankruptcy of said bankrupt, and the order to show cause made herein on the 18th day of December, 1931, and returnable on the 21st day of December, 1931, before this Court, having come on regularly to be heard in the presence of said counsel, and it appearing that said order to show cause was duly served, and upon consideration of the petition of the said Irving Trust Company referred to in said order to show cause, and upon all the papers on file in said matter in the District Court of the United States for the Southern District of New York and in this matter, and upon filing exemplified copies of the involuntary petition in bankruptcy filed against the said bankrupt in the District Court of the United States for the Southern District of New York and exemplified copy of the adjudication by said Court wherein it adjudged the said Crosby Stores, Inc., a bankrupt pursuant to the Acts of Congress made in bankruptcy, and exemplified copy of order of said Court approving the bond of the said Irving Trust Company as trustee in bankruptcy of said bankrupt, and it appearing to the Court that an order was duly made by the District Court of the United States for the Southern District of New York in said matter on the 14th day of

*Schedule "F," Annexed to Petition.*

December, 1931, wherein the said John Milton and J. S. S. Weissman were directed to forthwith turn over to the Irving Trust Company as trustee in bankruptcy of said bankrupt all the assets and property of the said bankrupt in their possession or under their control as receivers in Chancery, and it appearing to the Court that the said John Milton and J. S. S. Weissman, as receivers aforesaid, did receive into their possession, custody and control the assets and property belonging to said bankrupt, and it appearing to the Court that an order was made by said Court of Chancery bearing date the 14th day of December, 1931, granting to the said John Milton and J. S. S. Weissman jointly the sum of Six Thousand Dollars ($6,000.00) as compensation for their services as such receivers and to William Harris and Isaac Gross the sum of Four Thousand Dollars ($4,000.00) jointly, as compensation for their services as solicitors and counsel of said receivers, and to Isaac Gross the sum of Three Hundred Seventy-five Dollars ($375.00) for his services as solicitor for the complainant in the Chancery suit in which said receivers were appointed, and that the said allowances so granted had been paid by the receivers, and that he, the said Harris, had been paid by said receivers since the date of said order of the said Court of Chancery, and it appearing to the Court that adequate demand was made for said property, and it appearing to the Court that it was the duty of said receivers to turn the assets and property of the said bankrupt estate over to said trustee on the 7th day of December, 1931, on which date the bond of said trustee was duly approved by an order of said District Court of the United States for the Southern District of New York made in said matter, and it appearing to the Court that the relief herein prayed for should be granted, it is on this 22nd day of December, 1931, on motion of Bilder & Bilder, attorneys of said trustee

Ordered, that the said order to show cause be and the same is hereby made absolute and the said John Milton and

*Schedule "F," Annexed to Petition.*

J. S. S. Weissman, individually and as receivers for the stockholders and creditors of said Crosby Stores, Inc., the said bankrupt, heretofore appointed such receivers by the New Jersey Court of Chancery, William Harris and Isaac Gross be and they are hereby jointly and severally ordered and directed to forthwith turn over and deliver to said Irving Trust Company as trustee in bankruptcy of said bankrupt all and singular the property, assets and effects of said bankrupt now and/or heretofore in their or either of their possession, custody or control, excepting such moneys as they shall have necessarily expended in and about the preservation of the assets and property of said bankrupt prior to the date of the filing of the involuntary petition in bankruptcy against said bankrupt, and it is further

ORDERED, that the said John Milton and J. S. S. Weissman, individually and as receivers aforesaid, and the said William Harris and Isaac Gross, their agents, servants and attorneys, be and they are hereby jointly and severally restrained from interfering with said trustee in the taking possession of all assets and property in their and/or any or either of their possession, custody and control belonging to the estate of said bankrupt, and it is further

ORDERED, that the said John Milton and J. S. S. Weissman, William Harris and Isaac Gross be and they are hereby jointly and severally restrained from in any manner disposing of any and all moneys heretofore received by them and/or any of them pursuant to an order made by said Court of Chancery bearing date the 14th day of December, 1931, wherein they were awarded compensation for services alleged to have been rendered by them or any of them referred to in said order.

GUY L. FAKE,
U. S. D. J.

## Schedule "G," Annexed to Petition.

IN CHANCERY OF NEW JERSEY.

Between

PERFECTION GARMENT COMPANY, a corporation,
Complainant,

*and*

CROSBY STORES, INC., a corporation,
Defendant.

On Bill, &c. Petition, Report and Account of Receivers, etc.

*To His Honor Edwin Robert Walker, Chancellor of the State of New Jersey:*

The petition, report and account of John Milton and J. S. S. Weisman respectfully shows that:

1. They were duly appointed receivers of Crosby Stores, Inc., the above named defendant corporation, and qualified as such receivers and assumed the burdens of their said trust.

2. Of the assets of the said defendant corporation, there have come into the possession of your petitioners as such receivers, two large and extensive department stores theretofore owned and operated by the said defendant corporation, one located at 129 Newark Avenue, Jersey City, N. J., and the other at 99 Smith Street, Perth Amboy, N. J., both of which are located in the principal business centers of their respective communities, and your petitioners, as such receivers, pursuant to the authority vested in them by the order of their appointment, and by order subsequently made herein, continued the conduct of the business of both of said department stores.

*Schedule "G," Annexed to Petition.*

3. In the conduct of said business it became necessary to purchase large quantities of merchandise, since the merchandise inventory of both of said stores was considerably depleted when your petitioners, as such receivers, took possession, and your petitioners are now obligated to pay for merchandise so purchased by them, as far as your petitioners can now ascertain, the sum of $11,925.31; and your petitioners are likewise alleged to be liable for rent of the Jersey City store; for December, 1931, in the sum of $2,500 plus a proportionate share of taxes on said property; and on the Perth Amboy store, for the rent for the month of December, 1931, the sum of $1,333.33. Your petitioners, as such receivers, are also chargeable for the telephone service for said respective stores, light and power, rent or charge for the conveyor systems therein contained, advertising and other incidental expenses of operation.

4. The receipts by your petitioners as such receivers, in the Jersey City store, to December 1, 1931, including interest on bank balance, are $27,640.09, and the disbursements made by your petitioners therefrom are $12,011.56, thus leaving in the hands of your petitioners, as the net proceeds of the business conducted at said Jersey City store, on December 1, 1931, $15,629.53, all as shown on "Schedule A" hereunto annexed and made part hereof.

5. The receipts by your petitioners as such receivers, in the Perth Amboy store, to December 1, 1931, including interest on bank balance, are $11,760.28, and the disbursements made by your petitioners therefrom are $8,598.51, thus leaving in the hands of your petitioners, as the net proceeds of the business conducted at said Perth Amboy store, on December 1, 1931, $3,161.77, as shown on "Schedule B" hereunto annexed and made part hereof.

6. Prior to the appointment of your petitioners as such receivers, the above named defendant corporation had acquired merchandise from several persons under alleged

agreements of consignment, whereby the title to such merchandise or the proceeds of sale thereof were reserved to the respective consignors, and of the moneys so in hand at the Jersey City store, $2,382.12 represents the proceeds of sale of such alleged consigned merchandise, and of the moneys in hand at the Perth Amboy store, $594.40 represents the proceeds of sale of such alleged consigned merchandise.

7. Since the appointment of your petitioners as such receivers, said defendant Crosby Stores, Inc., was adjudicated bankrupt by the United States District Court for the Southern District of New York, and such proceedings were had therein that said court, on December 3, 1931, purported to sell, together with other assets of the said defendant corporation, both of said stores so in the possession of your petitioners, for the sum of $37,000.00, to include the merchandise so purchased by your petitioners as receivers herein, of which said defendant corporation was not in possession at the time of the filing of the petition in bankruptcy, nor had it at any time title thereto.

8. By orders duly made in this cause, Gross & Gross, and William Harris, Counselors at Law of this State, were appointed and designated as solicitors and of counsel with your petitioners as receivers herein.

9. Said solicitors and counsel have, from the time of the appointment of your petitioners as such receivers, rendered to your petitioners services as such solicitors and counsel and have been in almost daily conference and consultation with your petitioners with respect to the carrying on of the business of said receivership, and with respect to many legal problems and questions arising in connection therewith.

10. An order limiting creditors was made in this cause, which was duly published and served as in said order re-

quired, and a large proportion of the 400 creditors of said defendant corporation have duly filed their claims, all of which required examination and investigation as to their correctness for the purpose of their allowance or disallowance, all of which was done by your petitioners with the aid and assistance of their said solicitors and counsel.

11. In addition to the handling of the moneys by your petitioners as hereinabove set forth, your petitioners as such receivers handled stock of merchandise, furniture and fixtures and other property of the value of approximately $50,000.00.

12. Your petitioners desire the instructions of this court with respect to the further administration of their said trust as such receivers, and whether they should relinquish property and assets in their hands to the Irving Trust Company which has been appointed the trustee in bankruptcy of said defendant corporation by the United States District Court for the Southern District of New York, or to the alleged purchaser of said assets from said trustee in bankruptcy hereinabove referred to, although no demand for said property has as yet been made. Your petitioners, however, believe that demand for said property by said trustee in bankruptcy or by said alleged purchaser will be made in the near future.

13. Your petitioners desire to have fixed, determined and allowed to them and to their solicitors and counsel aforesaid and to solicitors of complainant, a proper fee and allowance for services rendered by them respectively as such, and to be indemnified in a manner to be directed by this court for any liability incurred by them as such receivers.

Wherefore, your petitioners pray that this, their report and account, may be passed and allowed. That their fees as receivers, and the fees of their said respective counsel

as such for services rendered by them respectively herein, be fixed and determined by this court, and directed to be paid out of the moneys in their hands as such receivers herein, and that they may be instructed with respect to the disposition to be made by them of the assets and property of the said defendant corporation remaining in their hands, and of the merchandise purchased by them as receivers herein, and what indemnity, if any, they shall receive upon turning over said property or any of it that they may be directed to turn over, either to said Irving Trust Company, Trustee in Bankruptcy of said defendant corporation, or to the alleged purchaser from said Irving Trust Company as such trustee.

J. S. S. Weisman,
John Milton,
Petitioners.

*Schedule "G," Annexed to Petition.*

JOHN MILTON & J. S. S. WEISMAN
Receivers for Crosby Stores, Inc.

*Jersey City Store* — *Schedule A*

RECAPITULATION.

| | |
|---|---|
| Total Receipts | $27,639.82 |
| Int. on Bank Balance | .27 |
| | $27,640.09 |
| Total Expenditures | 12,011.56 |
| CASH ON HAND IN BANKS | $15,628.53 |
| Receivers Mdse. on Hand at Cost., App. | 2,000.00 |
| TOTAL RECEIVERS ASSETS | $17,628.53 |

RECEIVERS LIABILITIES.

| | |
|---|---|
| For Consigned Mdse. Sold | $ 2,382.12 |
| For Mdse. Purchased | 8,832.73 |
| For Operating Expenses | 683.62 |
| TOTAL LIABILITIES | $11,898.47 |

(Full account annexed not necessary to print.)

*Schedule "G," Annexed to Petition.*

JOHN MILTON & J. S. S. WEISMAN
Receivers for Crosby Stores, Inc.

*Perth Amboy Store* — *Schedule B*

RECAPITULATION.

| | |
|---|---|
| Total Receipts | $11,760.28 |
| Total Expenditures | 8,598.51 |
| Cash on Hand in Bank | $ 3,161.77 |
| Receivers Mdse. on Hand at Retail | 4,882.00 |
| Total Receivers Assets | $ 8,043.77 |

RECEIVERS LIABILITIES.

| | |
|---|---|
| For Consigned Mdse. Sold | $ 594.40 |
| For Mdse. Purchased | 3,092.58 |
| For Operating Expenses | 512.85 |
| Total Liabilities | $ 4,199.83 |

(Full account annexed not necessary to print. Report and account duly verified.)

## Schedule "H," Annexed to Petition.

IN CHANCERY OF NEW JERSEY.

Between

PERFECTION GARMENT COMPANY,
a corporation,
Complainant,

*and*

CROSBY STORES, INC.,
a corporation,
Defendant.

On Bill, &c.

Petition, Report and Final Account of Receivers, &c.

*To his Honor Edwin Robert Walker, Chancellor of the State of New Jersey:*

The petition, report and final account of John Milton and J. S. S. Weisman, respectfully shows that:

1. By an order made herein on October 13th, 1931, your petitioners were duly appointed receivers of the above named defendant corporation and have duly qualified and have been acting as such.

2. That of the assets of said defendant corporation which have come to the hands of your petitioners as such receivers, were two certain stores of the said defendant corporation; one located at Perth Amboy, New Jersey, and the other at Jersey City, N. J., the business of which your petitioners were authorized to continue, and your petitioners, pursuant to said authority and the directions of this Court, continued from the date of their appointment as such receivers to conduct the same, and have bought such merchandise as they found necessary to replenish the stock or inventory of said stores, so that the business therein might be continued.

*Schedule "H," Annexed to Petition.*

3. Your petitioners filed their petition, report and account of the moneys received and disbursed by them on December 9th, 1931, and an order to show cause was made thereon on said last mentioned date, returnable December 14th, 1931, at which said time this Court proceeded to examine into your petitioners' said petition, report and account, and duly passed and allowed the same and made an order to that effect dated December 14th, 1931.

4. That in and by said petition, report and account of your petitioners as such receivers, it is shown that your petitioners had on hand and in banks, cash in the sum of $15,628.53 as the moneys to the credit of the Jersey City store, and the sum of $3,161.77 to the credit of the Perth Amboy store, making in all $18,790.30.

5. That in and by the said petition, report and account of your petitioners as such receivers, it likewise appears that your petitioners were indebted to their creditors for merchandise purchased by them in the conduct of the said Jersey City store in the sum of $8,832.73; for consigned merchandise sold at said store, the sum of $2,382.12, and for operating expenses, the sum of $683.62; and that they were likewise indebted for merchandise purchased by them in the conduct and operation of the Perth Amboy store, in the sum of $3,092.58; and for consigned merchandise sold at said store, the sum of $594.40; and for operating expenses, the sum of $512.85.

6. Said petition, report and account so filed by your petitioners on December 9th, 1931, which were so passed and allowed by the order of this Court made on December 14th, 1931, showed the results of the operations of your petitioners as such receivers up to the close of business on November 30th, 1931.

7. On December 1st, 1930, the trustee in bankruptcy of said defendant Crosby Stores, Inc., sold, and on December 18th, 1930, transferred by bill of sale, the property of said

defendant corporation, located in the State of New Jersey and in other states.

8. From December 1st, 1931 to December 17th, 1931, which was the last day of operation or conduct of business of said stores by your petitioner as such receivers, the receipts by your petitioners as such receivers in the Jersey City store, was $7,148.01, as shown on Schedule A, hereto annexed and made a part hereof.

9. From December 1st, 1931 to December 17th, 1931, which was the last day of operation or conduct of business of said stores by your petitioners as such receivers, the receipts by your petitioners as such receivers in the Perth Amboy store, was $3,379.97, as shown on Schedule B hereto annexed and made part thereof.

10. That annexed hereto and made part hereof as Schedule C is a schedule of itemization of the moneys disbursed by your petitioners as such receivers, out of the moneys to the credit of the Jersey City store, since December 1st, 1931, amounting in all to the sum of $12,860.34.

11. That annexed hereto and made part hereof as Schedule D is a schedule of itemization of the moneys disbursed by your petitioners as such receivers, out of the moneys to the credit of the Perth Amboy store, since December 1st, 1931, amounting in all to the sum of $564.34.

12. That there is shown in your petitioners' previous petition, report and account, receivers' liabilities of the Jersey City store, of $11,898.47, and your petitioners have incurred further liabilities in said Jersey City store, since December 1st, 1931, amounting to $3,342.20, as shown on Schedule E hereunto annexed and made part hereof.

13. That there is shown in your petitioners' previous petition, report and account, receivers' liabilities of the

*Schedule "H," Annexed to Petition.*

Perth Amboy store, of $4,199.83, and your petitioners have incurred further liabilities in said Perth Amboy store, since December 1st, 1931, amounting to $315.82, as shown on Schedule F hereunto annexed and made part hereof.

14. There is now in the hands of your petitioners in all the sum of $15,920.41.

15. There is likewise owned by your petitioners, as such receivers, a stock of merchandise which was purchased by them as such receivers, in both of said stores, of the cost value of $4,906.82, which said stock of merchandise was taken from their possession by Harry Bachrach, Benjamin Bachrach, Oscar Bachrach and General Department Stores, Inc., concerning which said taking, your petitioners are now proceeding against said parties in this Court, for appropriate relief.

16. There are likewise other items due to your petitioners for refund due for insurance premiums advanced—$691.47, petty cash on hand at Jersey City, $100 and petty cash on hand at Perth Amboy, $60, all as is shown on Schedule F, and your petitioners' total liabilities as far as they are able to ascertain the same, are $19,756.32 for merchandise purchased by your petitioners as such receivers, at both of said stores and otherwise as well as for consigned merchandise sold by them therein, all as appears on Schedule G.

17. That said indebtedness so owing by your petitioners as receivers to their creditors, are past due and should be paid.

18. That your petitioners have heretofore filed petition for instructions fully and completely setting forth all the facts and circumstances concerning the bankruptcy of said Crosby Stores, Inc., the above named defendant corpora-

tion, and your petitioners as such receivers, have received due instructions of this Court with respect to the disposition of their said trust, and otherwise, as prayed by the said petition for instructions, as by the opinion of this Court thereon, and the order of this Court made on February , 1932, thereon, will more fully and at large appear.

Wherefore your petitioners pray that an order may be made herein allowing, passing and approving this, their report and account, and that your petitioners may proceed to carry out and perform the instructions so given to them, pursuant to the terms of said order.

JOHN MILTON,
J. S. S. WEISMAN,
Petitioners.

(Petition duly verified.)

*Schedule "H," Annexed to Petition.*

JOHN MILTON & J. S. S. WEISMAN,
Receivers—CROSBY STORES, INC.

RECAPITULATION.

*Schedule G:*

RECEIVERS' ASSETS.

| | |
|---|---|
| Cash on Hand | $15,920.41 |
| Refund Due for Insurance Premiums Advanced | 691.47 |
| Petty Cash on Hand—Jersey City store | 100.00 |
| Petty Cash on Hand—Perth Amboy store | 60.00 |

RECEIVERS' LIABILITIES.

| | |
|---|---|
| Accounts Payable—Jersey City | $12,660.12 |
| Accounts Payable—Perth Amboy | 3,919.95 |
| For consigned Mdse. Sold—Jersey City | 2,580.55 |
| For consigned Mdse. Sold—Perth Amboy | 595.70 |
| Total Receivers' Liabilities | $19,756.32 |

Liabilities, if any, for rent for use and occupation of Jersey City store and Perth Amboy store, unknown and undetermined.

## Order to Show Cause Why Respondents Should Not be Directed to Pay Over Money to Trustee.

(Filed July 1, 1932.)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

| | |
|---|---|
| IN THE MATTER *of* CROSBY STORES, INC., Bankrupt. | In Bankruptcy. Order to Show Cause. |

The Irving Trust Company, trustee in bankruptcy of the above named bankrupt corporation having filed its duly verified petition herein praying that an order be made requiring John Milton and J. S. S. Weisman individually and as receivers appointed by the New Jersey Court of Chancery and William Harris and Isaac Gross summarily to turn over to said Irving Trust Company the assets of the said bankrupt estate and for other relief and good and sufficient reason appearing for the entry of this order, it is on this 1st day of July, 1932, on motion of Bilder & Bilder, attorneys of said trustee

ORDERED that John Milton and J. S. S. Weisman, individually and as receivers appointed by the New Jersey Court of Chancery and William Harris and Isaac Gross show cause before the Judges of this Court on Monday, the 1st day of August, 1932, at 10:30 o'clock in the forenoon (daylight saving time), or as soon thereafter as counsel can be heard at the courtrooms thereof in the Lefcourt-Newark Building, 11 Raymond Blvd., in the City of Newark, County of Essex and State of New Jersey, why an

order should not be made in accordance with the prayers of said petition; and it is further

ORDERED that a copy of this order together with a copy of the petition upon which this order is based be served upon said John Milton, J. S. S. Weisman, William Harris and Isaac Gross within 5 days of the date of this order.

GUY L. FAKE,
U. S. D. J.

STATEMENT.

The parties appeared. The facts stated in petition were conceded to be correct. The case was argued.

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## Memorandum of Court.

(Filed September 6, 1932.)

Appearances:

MESSRS. BILDER & BILDER (Samuel Kaufman and Arthur Leonard Ross of the New York Bar) for the Trustee;

WILLIAM HARRIS, Esq., Solicitor for Respondent Isaac Gross, Esq., *Pro se.*

FAKE, District Judge.

In the above entitled matter I can see no distinguishing difference between a State Court of Equity and a Federal Court of Equity so far as jurisdiction after bankruptcy is concerned. I will therefore follow the same rule here as is found in *Silberberg* vs. *Ray Chain Stores*, 54 Fed. (2) 650, affirmed 58 Fed. (2) 766, also see *Moore* vs. *Scott*, 55 Fed. (2) 863, and *in re Diamond*, 259 Fed. 70.

The prayers of the trustee's petition should be granted and an order will be signed accordingly.

## Order Directing Payment by Respondent Appealed From.

(Filed August 31, 1932.)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

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| IN THE MATTER *of* CROSBY STORES, INC., Bankrupt. | In Bankruptcy. Order. |

The trustee in bankruptcy of the above named bankrupt having filed a duly verified petition praying for an order directing J. S. S. Weisman and John Milton, individually and as receivers and William Harris and Isaac Gross to turn over to the said trustee in bankruptcy the assets of the said bankrupt estate including and not by way of limitation the sums of money awarded to the receivers and counsel by the Court of Chancery of New Jersey as compensation for their services as hereinafter set forth and to file their account with the United States District Court for the District of New Jersey and an order having issued thereon requiring the said J. S. S. Weisman and John Milton, individually and as receivers appointed by the New Jersey Court of Chancery and William Harris and Isaac Gross to show cause before the Judges of this Court on Monday the 1st day of August, 1932, at the courtrooms thereof why an order should not be made in accordance with the prayers of said petition and the matter coming on regularly to be heard in the presence of Samuel Kaufman of counsel with the said trustee and William Harris and Isaac Gross of counsel with said receivers and *pro se* and

good and sufficient reason appearing for the entry of this order it is on this 31st day of August, A. D. 1932, on motion of Bilder & Bilder, solicitors of the trustee,

ORDERED that the prayers of the said petition be and the same are hereby granted; and it is further

ORDERED that John Milton and J. S. S. Weisman individually and as receivers turn over to the said trustee in bankruptcy the assets of the bankrupt estate including and not by way of limitation the sum of $6,000.00 paid to the said John Milton and J. S. S. Weisman as receivers jointly; and it is further

ORDERED that Gross & Gross and William Harris turn over to the said trustee in bankruptcy the sum of $4,000 besides their taxed costs being the sums paid to them as solicitors of the said receivers; and it is further

ORDERED that Gross & Gross turn over to the said trustee in bankruptcy in addition thereto the further sum of $350.00 paid to them as solicitors of the complainant in the proceedings pending in the Court of Chancery of New Jersey wherein Perfection Garment Co., a corporation, is complainant, and Crosby Stores, Inc., is defendant; and it is further

ORDERED that the said J. S. S. Weisman and John Milton, receivers, file their accounts with the United States District Court for the District of New Jersey pursuant to the rules of the Court in such case made and provided.

GUY L. FAKE,
U. S. D. J.

## Order Modifying Order as to Payments.

(Filed Sept. 15, 1932.)

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

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| IN THE MATTER<br>*of*<br>CROSBY STORES, INC.,<br>Bankrupt. | In Bankruptcy.<br>Order. |

This matter being opened to the Court by William Harris, of counsel with the respondents, J. S. S. Weisman and John Milton, individually and as receivers, Isaac Gross and Gross & Gross and William Harris, and upon consent:

It is, on this 15th day of September, 1932, ORDERED that the order of this Court made on the 31st day of August, 1932, be modified by providing that the payments therein directed to be made by the respective respondents to the Trustee in Bankruptcy be made to the Clerk of this Court and that such moneys remain with the Clerk of this Court until this Court shall determine, if application therefor be made, whether the respective respondents are entitled to compensation or any payments out of said fund, and if so, the amount thereof, or until the further order of this Court.

GUY L. FAKE,
Judge of the United States District Court, District of New Jersey.

I hereby consent to the entry of the above order.

BILDER & BILDER,
Of Counsel with Trustee.

## Petition of Appeal and Notice of Appeal of Gross, Gross and William Harris, Solicitors of Receivers.

(Filed September 26, 1932.)

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

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| IN THE MATTER of CROSBY STORES, INC., Bankrupt. | In Bankruptcy. Petition of Appeal and Notice of Appeal of Gross, Gross and William Harris, Solicitors of Receivers. |

*To the Honorable the Judges of the United States District Court for the District of New Jersey and to Irving Trust Company, Trustee in Bankruptcy of Crosby Stores, Inc.:*

Isaac Gross and Joel Gross, partners as Gross and Gross, and William Harris, who were solicitors of J. S. S. Weisman and John Milton receivers of Crosby Stores, Inc., appointed by the Court of Chancery in a cause therein depending wherein Perfection Garment Co. is complainant and Crosby Stores, Inc., is defendant hereby appeal from the judgment, order or decree made herein on the 31st day of August, 1932, as modified by the order of September 15, 1932, by the United States District Court for the District of New Jersey directing the said Isaac Gross and Joel Gross, partners as Gross and Gross, and William Harris to perform certain acts to the United States Circuit Court of Appeals for the Third Circuit, and petition the Judges of the United States District Court, for the District of New Jersey to allow said appeal (although contending that no allowance is necessary) and to direct the record and proceedings to be remitted to the United States Circuit Court of Appeals for the Third Circuit, and tender

their individual bond for the performance of the directions of the said decree, judgment or order if the same shall be affirmed and pray that the operation of the said order shall be stayed pending appeal.

GROSS & GROSS,
Solicitors.

*Pro se*, and WILLIAM HARRIS.

Dated: September 24th, 1932.

Similar petitions and notices of appeal filed on same date by J. S. S. Weisman and John Milton, individually and as receivers of Crosby Stores, Inc., and by Isaac Gross and Joel Gross, partners as Gross & Gross, solicitors of complainant, Perfection Garment Co. Service of the three petitions and notices of appeal acknowledged September 27th, 1932, by Bilder & Bilder, Esqs., solicitors for Trustee in Bankruptcy.

**Order Allowing Appeal and for Stay on Appeal of Gross and Gross and William Harris, Solicitors of Receivers.**

(Filed September 26, 1932.)

On motion of Merritt Lane, of counsel with Isaac Gross and Joel Gross, partners as Gross and Gross, and William Harris, who were solicitors of J. S. S. Weisman and John Milton, receivers of Crosby Stores, Inc., appointed by the Court of Chancery of New Jersey, in a cause therein depending wherein Perfection Garment Co. is complainant and Crosby Stores, Inc., is defendant:

It is, on this 26th day of September, 1932, ORDERED that an appeal to the United States Circuit Court of Appeals for the Third Circuit is allowed, and it is ORDERED that a certified transcript of any and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Third Circuit, and the appellants having tendered their individual bond for the performance of such portions of the order, judgment or decree as are by them to be performed:

It is ordered that all proceedings upon such order, judgment or decree be stayed pending the determination of the appeal, the said bond being approved and ordered filed.

GUY L. FAKE,
Judge of the United States District Court,
District of New Jersey.

Similar orders entered on same day on appeal of J. S. S. Weisman and John Milton, individually and as receivers of Crosby Stores, Inc., and on appeal of Isaac Gross and Joel Gross, partners as Gross & Gross, solicitors of complainant, Perfection Garment Co. Service of the three orders acknowledged September 27, 1923, by Bilder & Bilder, Esqs., solicitors for Trustee in Bankruptcy. Citations also duly issued on all three appeals.

## Assignment of Errors on Appeal of Gross and Gross, Solicitors for Complainant in Chancery.

Now comes Isaac Gross and Joel Gross, partners as Gross and Gross, who were solicitors of the complainant in a certain cause pending in the Court of Chancery of New Jersey wherein Perfection Garment Co. is complainant and Crosby Stores, Inc., is defendant and says that the order, judgment or decree appealed from is erroneous in this:

1. That the said order, judgment or decree orders appellants to turn over to the trustee in bankruptcy or to the Clerk of the Court the sum of $350 paid to them as solicitors of the complainant in a proceeding pending in the Court of Chancery of New Jersey wherein Perfection Garment Co. is complainant and Crosby Stores, Inc., is defendant.

And appellants assign as error:

1. The United States District Court for the District of New Jersey erred in determining that it had jurisdiction in bankruptcy to order appellants to turn over to it a fee which had been allowed to them by an order of the Court of Chancery of New Jersey made in a receivership proceeding pending in said court in which the Court of Chancery had appointed receivers prior to the filing of bankruptcy proceedings in a cause pending in the Court of Chancery over which that court had jurisdiction under the law and provisions of the statutes of the State of New Jersey, the said court having, under the laws and statutes of the State of New Jersey power to make allowances to the solicitors for the complainant, the procedure under the laws and statutes of the State of New Jersey for the appointment of receivers being in the nature of an equitable *quo warranto* and in the public interest, the complainant acting in effect *pro hac vice* the Attorney General.

*Assignment of Errors on Appeal of Gross and Gross, Solicitors for Complainant in Chancery.*

2. The United States District Court for the District of New Jersey erred in holding that upon the filing of the petition in bankruptcy the New Jersey Court of Chancery lost title and jurisdiction over the *res*, and thereby lost power to make allowances to the solicitors of the appellants in that cause.

3. The United States District Court for the District of New Jersey erred in not holding that, by the true construction of the bankruptcy act, Congress did not intend that the jurisdiction of the State court, which had taken over possession of the property and assets of the corporation under the law and statutes of the State providing for a procedure equivalent to equitable *quo warranto* should be *ipso facto* deprived of the right to provide for the payment for the services of the officers of the court including the solicitors of the complainant engaged in the administration of the trust.

4. The United States District Court for the District of New Jersey erred in not holding that under constitution of the United States and the system of government of the United States Congress was without power to pass legislation which would take from a State court which had appointed a receiver in proceedings equivalent to equitable *quo warranto*, which receiver had, prior to bankruptcy, taken possession of the assets and property of the corporation under the laws of the State, the power to provide for the payment of services of counsel for the complainant who had brought the cause to the attention of the court and who had aided in the administration of the trust, and who was an officer of the court before surrendering possession of the *res* to a court of the United States in bankruptcy or otherwise.

5. The United States District Court for the District of New Jersey erred in not holding that, as matter of comity, the United States District Court should recognize the orders

of the courts of the State fixing the compensation of the solicitors of the complainant where the receivers were appointed by the State court under the laws of the State prior to the intervention of bankruptcy and such receivers had taken possession of the assets and property of the corporation and the proceedings in the State court were equivalent to an equitable *quo warranto*.

6. The United States District Court for the District of New Jersey erred in not holding that the proper method of procedure was for the trustee in bankruptcy, if it were dissatisfied with the order of the State court fixing the compensation of the solicitors of the complainant in a cause pending in that court to appeal to the appropriate State appellate tribunal and thence to the Supreme Court of the United States.

7. The United States District Court for the District of New Jersey erred in not holding that the trustee in bankruptcy was by its conduct in acquiescing in the administration of the affairs of the Crosby Stores, Inc., after bankruptcy by the receivers appointed by the Court of Chancery of New Jersey and by its other conduct subsequent to bankruptcy, estopped from denying the right of the Court of Chancery to make the orders which it did approving the account of its receivers and allowing compensation to them, and to the solicitors of the complainant in the cause pending in the Court of Chancery of New Jersey which was equivalent to an equitable *quo warranto*.

8. The United States District Court for the District of New Jersey erred in not holding that the Court of Chancery of New Jersey had the power to compensate the solicitors of the complainant in a cause equivalent to an equitable *quo warranto* in which the court had appointed receivers and said receivers had operated the business under the

orders of the court out of the proceeds of the operation of the business.

WHEREFORE, the appellants pray that such order, judgment or decree be reversed and that the District Court of the United States for the District of New Jersey be directed to enter an order denying the application made by the trustee in bankruptcy.

GROSS & GROSS,
Solicitors for Isaac Gross and Joel Gross,
Partners trading as Gross & Gross.

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## Assignment of Errors on Appeal of Receivers in Chancery.

(Filed Sept. 26, 1932.)

Now comes the said J. S. S. Weisman and John Milton, individually and as receivers of Crosby Stores, Inc., appointed by the Court of Chancery of the State of New Jersey in a cause wherein Perfection Garment Co. is complainant and Crosby Stores, Inc., is defendant and says that the order, judgment or decree appealed from is erroneous in this:

1. That the said order, judgment or decree orders appellants individually and as receivers to turn over to the Trustee in Bankruptcy or to the Clerk of the Court the bankrupt estate including and not by way of limitation the sum of $6,000 paid to the said J. S. S. Weisman and John Milton as receivers jointly.

2. In that said order, judgment or decree orders and directs that the said J. S. S. Weisman and John Milton receivers file their account with the United States District

Court for the District of New Jersey pursuant to the rules of the Court in such case made and provided.

Appellants assign as error:

1. The United States District Court for the District of New Jersey erred in determining that it had jurisdiction in bankruptcy to order and direct appellants as receivers and individually to turn over to the trustee in bankruptcy the fees which had been allowed to them for services rendered as receivers appointed by the Court of Chancery of the State of New Jersey of the bankrupt prior to the filing of bankruptcy proceedings in a cause pending in the Court of Chancery of New Jersey over which that Court had jurisdiction under the law and the provisions of the statutes of the State of New Jersey.

2. The United States District Court for the District of New Jersey erred in determining that it had jurisdiction to compel appellants to file their accounts in the United States District Court for the District of New Jersey as receivers duly appointed by the Court of Chancery of New Jersey of the bankrupt prior to the intervention of the bankruptcy proceedings in a cause over which the Court of Chancery of New Jersey had complete jurisdiction under the law and the provisions of the statutes of the State of New Jersey, their accounts having already been filed and approved by the Court of Chancery of the State of New Jersey, which had full and complete jurisdiction so to do notwithstanding the intervention of the bankruptcy proceedings.

3. The United States District Court for the District of New Jersey erred in holding that upon the filing of the petition in bankruptcy the New Jersey Court of Chancery lost title and jurisdiction over the *res*, and therefore lost power to make allowances to its receivers and to approve its receivers' accounts.

*Assignment of Errors on Appeal of Receivers in Chancery.*

4. The United States District Court for the District of New Jersey erred in not holding that, by the true construction of the bankruptcy act, Congress did not intend that the jurisdiction of the State Court, which had taken over possession of the property and assets of a corporation under the law and statutes of the State should be *ipso facto* deprived of the right to provide for the payment of the debts incurred by the receivers upon the faith of the orders of the Court to compensate its receivers and to pass upon its receivers' accounts.

5. The United States District Court for the District of New Jersey erred in not holding that under the constitution of the United States and the system of government of the United States Congress was without power to pass legislation which would take from a State Court which had appointed a receiver, which receiver had, prior to bankruptcy, taken possession of the assets and property of the corporation under the laws of the State, the power to provide for the payment of the debts of the receivers incurred upon the faith of the orders of the Court, to compensate its receivers and other officers and to pass upon the accounts of its receivers before surrendering possession of the *res* to a Court of the United States in bankruptcy or otherwise.

6. The United States District Court for the District of New Jersey erred in not holding that as matter of comity the United States District Court should recognize the orders of the Courts of the State fixing the compensation of its receivers where the receivers were appointed by the State Court under the laws of the State prior to the intervention of bankruptcy and such receivers had taken possession of the assets and property of the corporation and the orders of said State Court approving the accounts of its receivers.

*Assignment of Errors on Appeal of Receivers in Chancery.*

7. The United States District Court for the District of New Jersey erred in not holding that the proper method of procedure was for the trustee in bankruptcy, if it were dissatisfied with the order of the State Court fixing the compensation of receivers and approving the accounts of its receivers to appeal to the appropriate State appellate tribunal and thence to the Supreme Court of the United States.

8. The United States District Court for the District of New Jersey erred in not holding that the trustee in bankruptcy was by its conduct in acquiescing in the administration of the affairs of the Crosby Stores, Inc., after bankruptcy by the receivers appointed by the Court of Chancery of New Jersey and by its other conduct subsequent to bankruptcy, estopped from denying the right of the Court of Chancery to make the orders which it did approving the accounts of its receivers and allowing compensation to them.

9. The United States District Court for the District of New Jersey erred in not holding that the Court of Chancery had the right to approve the accounts of its receivers appertaining to the conduct of the business by such receivers under the orders of the Court of Chancery and to compensate its receivers out of the proceeds of the operation of such business.

10. The United States District Court for the District of New Jersey erred in not holding that prior to the institution of any proceedings against the receivers appointed by the Court of Chancery there should have been an application to the Court of Chancery which had appointed such receivers for leave to sue the receivers.

WHEREFORE, the appellants pray that such order, judgment or decree be reversed and that the District Court of

the United States for the District of New Jersey be directed to enter an order denying the application made by the trustee in bankruptcy.

J. S. S. Weisman.
John Milton.

Gross & Gross,
Solicitors for J. S. S. Weisman and John Milton, Individually and as Receivers of Crosby Stores, Inc.

Bonds in each case properly filed. Citation in each case properly issued, served and filed.

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## Assignment of Errors on Appeal of Gross and Gross and William Harris, Solicitors for Receivers.

(Filed Sept. 26, 1932.)

Now comes the said Isaac Gross and Joel Gross, partners as Gross and Gross, and William Harris, who were solicitors of J. S. S. Weisman and John Milton, receivers of Crosby Stores, Inc., appointed by the Court of Chancery of the State of New Jersey, in a cause wherein Perfection Garment Co. is complainant and Crosby Stores, Inc., is defendant and says that the order, judgment or decree appealed from is erroneous in this:

1. That the said order, judgment or decree orders appellants to turn over to the trustee in bankruptcy or to the Clerk of the Court the sum of $4,000 besides their taxed costs.

And appellants assign as error:

1. The United States District Court for the District of New Jersey erred in determining that it had jurisdiction

in bankruptcy to order and direct appellants to turn over to the trustee in bankruptcy the moneys allowed to them as compensation and their taxed costs as the solicitors for the receivers appointed by the Court of Chancery of the State of New Jersey of the bankrupt prior to the filing of bankruptcy proceedings in a cause pending in the Court of Chancery of New Jersey over which that Court had jurisdiction under the law and the provisions of the statutes of the State of New Jersey.

2. The United States District Court for the District of New Jersey erred in determining that it had jurisdiction to compel appellants to turn over to the trustee in bankruptcy the amount awarded to them as compensation besides their taxed costs as solicitors of the receivers duly appointed by the Court of Chancery of New Jersey of the bankrupt prior to the intervention of the bankruptcy proceedings in a cause over which the Court of Chancery of New Jersey had complete jurisdiction under the law and the provisions of the statutes of the State of New Jersey, the accounts of such receivers having already been filed and approved by the Court of Chancery of the State of New Jersey, and the allowances having already been made to appellants by the Court of Chancery of the State of New Jersey which had full and complete jurisdiction so to do notwithstanding the intervention of the bankruptcy proceedings.

3. The United States District Court for the District of New Jersey erred in holding that upon the filing of the petition in bankruptcy the New Jersey Court of Chancery lost title and jurisdiction over the *res*, and thereby lost power to make allowances to appellants duly appointed by the Court of Chancery of New Jersey as solicitors of the receivers and officers of that Court in the administration of the trust.

*Assignment of Errors on Appeal of Gross and Gross and William Harris, Solicitors for Receivers.*

4. The United States District Court for the District of New Jersey erred in not holding that, by the true construction of the bankruptcy act, Congress did not intend that the jurisdiction of the State Court, which had taken over possession of the property and assets of a corporation under the law and statutes of the State should be *ipso facto* deprived of the right to provide for the payment of the debts incurred by the receivers upon the faith of the orders of the Court and to compensate its officers engaged in the administration of the trust including solicitors duly appointed for the receivers and to provide for their expenses, including taxed costs.

5. The United States District Court for the District of New Jersey erred in not holding that under the constitution of the United States and the system of government of the United States Congress was without power to pass legislation which would take from a State court which had appointed a receiver, which receiver had, prior to bankruptcy, taken possession of the assets and property of the corporation under the laws of the State, the power to provide for the payment of the debts of the receivers incurred upon the faith of the orders of the court, to compensate its receivers and other officers including solicitors appointed by the Court to aid in the administration of the trust and to provide for their expenses, including taxed costs, and to pass upon the accounts of its receivers before surrendering possession of the *res* to a court of the United States in bankruptcy or otherwise.

6. The United States District Court for the District of New Jersey erred in not holding that as matter of comity the United States District Court should recognize the orders of the courts of the State fixing the compensation of the solicitors of the receivers duly appointed by the court to aid in the administration of the trust and to pro-

vide for their expenses including taxed costs where the receivers and such solicitors were appointed by the State court under the laws of the State prior to the intervention of bankruptcy and such receivers had taken possession of the assets and property of the corporation.

7. The United States District Court for the District of New Jersey erred in not holding that the proper method of procedure was for the trustee in bankruptcy, if it were dissatisfied with the order of the State court fixing the compensation of the solicitors of the receivers duly appointed by the State court to aid in the administration of the trust and to provide for their compensation including taxed costs, to appeal to the appropriate State appellate tribunal and thence to the Supreme Court of the United States.

8. The United States District Court for the District of New Jersey erred in not holding that the trustee in bankruptcy was by its conduct in acquiescing in the administration of the affairs of the Crosby Stores, Inc., after bankruptcy by the receivers appointed by the Court of Chancery of New Jersey and its other conduct subsequent to bankruptcy, estopped from denying the right of the Court of Chancery to make the orders which it did providing for compensation to the solicitors of the receivers and approving the accounts of its receivers and allowing compensation to them and to their solicitors duly appointed by the Court of Chancery to aid in the administration of the trust and to provide for the payment of their expenses including taxed costs.

9. The United States District Court for the District of New Jersey erred in not holding that the Court of Chancery of New Jersey had the right to approve the accounts of its receivers appertaining to the conduct of the business by such receivers under the orders of the Court of

*Assignment of Errors on Appeal of Gross and Gross and William Harris, Solicitors for Receivers.*

Chancery and to compensate its receivers and solicitors out of the proceeds of the operation of such business.

10. The United States District Court for the District of New Jersey erred in not holding that prior to the institution of any proceedings against the receivers appointed by the Court of Chancery there should have been an application to the Court of Chancery which had appointed such receivers for leave to sue the receivers and their solicitors.

WHEREFORE, the appellants pray that such order, judgment or decree be reversed and that the District Court of the United States for the District of New Jersey be directed to enter an order denying the application made by the trustee in bankruptcy.

GROSS & GROSS,
Solicitors for Isaac Gross and Joel Gross, partners, as Gross & Gross and for Wm. Harris.

## Opinion.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 5009. October Term, 1932.

ISAAC GROSS, *et al.*, as GROSS & GROSS, etc.,
Appellants,

*vs.*

IRVING TRUST CO., Trustee Crosby Stores, Inc., Bankrupt,
Appellee.

No. 5010. October Term, 1932.

J. S. S. WEISMAN, *et al.*, Revrs. in Chancery Crosby Stores,
Appellants,

*vs.*

IRVING TRUST CO., Trustee Crosby Stores, Inc.,
Appellee.

No. 5011. October Term, 1932.

ISAAC GROSS, *et al.*, and WM. HARRIS, Solicitors for Revrs.,
Appellants,

*vs.*

IRVING TRUST CO., Trustee Crosby Stores, Inc., Bankrupt,
Appellee.

And afterwards, to wit, the 12th day of October, 1932, come the parties aforesaid by their counsel aforesaid, and

Minute entry of argument and submission, October 12, 1932, omitted in printing.

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In United States Circuit Court of Appeals for the Third Circuit

No. 5009, October Term, 1932

Isaac Gross and Joel Gross, Partners as Gross & Gross, Solicitors for Complainant in Chancery, Appellants,

v.

Irving Trust Co., Trustee Crosby Stores, Inc., Bankrupt, Appellee

No. 5010, October Term, 1932

J. S. S. Weisman and John Milton, Receivers in Chancery of Crosby Stores, Inc., Appellants,

v.

Irving Trust Co., Trustee Crosby Stores, Inc., Bankrupt, Appellee

No. 5011, October Term, 1932

Isaac Gross and Joel Gross, Partners as Gross & Gross, and William Harris, Solicitors for Receivers in Chancery, Appellants,

v.

Irving Trust Co., Trustee Crosby Stores, Inc., Bankrupt, Appellee

Upon Appeals from the District Court of the United States for the District of New Jersey

Before Woolley, Davis, and Thompson, Circuit Judges

Opinion—Filed November 17, 1932

Thompson, Circuit Judge:

These are appeals from an order of the District Court for the District of New Jersey sitting in bankruptcy. The facts are undisputed and are as follows:

Crosby Stores, Inc., operated a chain of stores in New York and New Jersey. A bill of complaint was filed in September, 1931, in the Court of Chancery of New Jersey for the appointment of a receiver for Crosby Stores, Inc., under section 65 of the General Corporation Act of New Jersey, Revision of 1896. On October 13, 1931, the Court of Chancery of New Jersey appointed receivers who took possession of the corporation's assets in New Jersey and continued to operate the two New Jersey stores, buying and selling merchandise and incurring obligations. On October 14, 1931, an involuntary petition in bankruptcy was filed in the District Court for the Southern District of New York against Crosby Stores, Inc., and the Irving Trust Company was appointed receiver in bankruptcy by that court. The corporation was adjudged a bankrupt on October 30, 1931, and on December 1, 1931, the Irving Trust Company was continued in office as trustee in bankruptcy. The trustee sold all of the assets of the bankrupt including the two stores in New Jersey. On December 14, 1931, the Court of Chancery of New Jersey made allowances aggregating $10,350 to its receivers and their counsel. The District Court for the District of New Jersey, upon petition by the trustee in bankruptcy, in a summary proceeding upon a rule to show cause, ordered the state court receivers and their counsel to turn over to the trustee in bankruptcy all of the assets of the bankrupt estate in their possession, together with the allowances paid to them; to file their accounts in the District Court sitting in bankruptcy; and to have their compensation and fees fixed by that court. The state receivers then took this appeal.

The question presented is: Did the Court of Chancery of New Jersey have the power to fix the compensation of its receivers and the fees of their counsel after bankruptcy had intervened within four months of the date of filing the bill of complaint in the state court and the appointment of the receivers by the state court?

A similar question was decided by this court in Silberberg v. Ray Chain Stores, Inc., 58 F. (2d) 766 (certiorari denied October 17, 1932). In that case the District Court for New Jersey sitting in equity appointed receivers who applied to it for compensation. Bankruptcy intervened prior to the petition for compensation. The District Court

sitting in equity denied the petition, holding that after bankruptcy any application for the receivers' compensation and the fees of their counsel should be made to the District Court sitting in bankruptcy. We sustained the District Court, following the decision of the Ninth Circuit in Moore v. Scott, 55 F. (2d) 863. Although in the instant case the disputed jurisdiction is between a state court of chancery and a federal court of bankruptcy, the principle involved is the same as that in the Silberberg case. Congress has vested the jurisdiction in bankruptcy in the federal courts and has made this jurisdiction exclusive in the interests of the insolvent estate and the preservation of the rights of both secured and unsecured creditors. Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734. Straton v. New, 283 U. S. 318. Applying the rulings of Moore v. Scott, supra, and authorities cited therein, and our own ruling in Silberberg v. Ray Chain Stores, supra, we reach the conclusion that the state court lost jurisdiction to fix the compensation of the receivers and the fees of their counsel after the bankruptcy court acquired jurisdiction. The language of the Supreme Court in Lion Bonding & Surety Co. v. Karatz, 262 U. S. 640, is persuasive. Mr. Justice Brandeis there said:

"Even where the court which appoints a receiver had jurisdiction at the time, but loses it, as upon supervening bankruptcy, the first court cannot thereafter make an allowance for his expenses and compensation. He must apply to the bankruptcy court."

The state receivers contend that recovery of the compensation and fees already allowed could be had by the trustee only in a plenary suit and that the District Court had no jurisdiction in a summary proceeding to order them to account to the trustee. On this point we quote the opinion of the Sixth Circuit in In re Diamond's Estate, 259 Fed. 70, 74:

"The question of ultimate importance is whether or not the petitioner, at the time bankruptcy intervened, was holding the fund in question adversely to the bankrupts or their estate. If so, jurisdiction by summary proceeding was lacking. Louisville Trust Co. v. Comingor, 184 U. S. 18, * * * On the other hand, there was jurisdiction to

compel the surrender of the fund, if not so adversely held. Mueller v. Nugent, 184 U. S. 1, * * * It is well settled that the possession of an assignee for the benefit of creditors is not adverse to the bankrupt or his estate. Bryan v. Bernheimer, 181 U. S. 188, * * *; Mueller v. Nugent, supra, 184 U. S. at page 70, * * *; In re Stewart (C. C. A. 6) 179 Fed. 222, 225, * * *; In re Neuburger, supra. In such case it is held that the adjudication in bankruptcy automatically and of its own force avoids the assignment and terminates the right of possession by the assignee. While the possession of the state court's receiver differed in some respects from that of an assignee for the benefit of creditors, in that the latter holds merely as an agent or representative of the bankrupt himself, yet we think the difference not conclusive. When bankruptcy intervened, the receiver was holding not in his own right, but merely in an official capacity and as the hand of the court, and not, we think, adversely to the bankrupts or their estate, within the meaning of the law. In re Watts & Sachs, supra, 190 U. S. at page 27, * * *; Hooks v. Aldridge (C. C. A. 5) 145 Fed. 865, * * *; In re Hecox (C. C. A. 8) 164 Fed. 823, * * * Had the state court made before bankruptcy an order for compensation, and had disbursement thereunder been made before the commencement of bankruptcy proceedings (as was the case in Louisville Trust Co. v. Comingor, supra), the situation would have been different.

"The fact that petitioner disbursed the $1,175 fund under the state court's order of October 29th did not convert a formerly non-adverse holding into one of an adversary character; for he then knew of the bankruptcy proceedings and of the efforts of the bankruptcy court then and there being made to prevent such action. Bryan v. Bernheimer, supra, 181 U. S. at pages 191 and 193, * * *"

We are in entire accord with the reasoning and conclusions thus expressed.

The order of the District Court is affirmed.

A true copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

In United States Circuit Court of Appeals for the Third Circuit, October Term, 1932

No. 5009

Isaac Gross and Joel Gross, Partners as Gross & Gross, Solicitors for Complainant in Chancery, Appellants,

vs.

Irving Trust Co., Trustee Crosby Stores, Inc., Bankrupt, Appellee

Appeal from the District Court of the United States for the District of New Jersey

Decree—Filed Nov. 17, 1932

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the orders of the said District Court of August 31, 1932, and September 15, 1932, in this cause be, and the same are hereby, affirmed, with costs.

Philadelphia, November 17, 1932.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

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In United States Circuit Court of Appeals for the Third Circuit, October Term, 1932

No. 5010

J. S. S. Weisman and John Milton, Receivers in Chancery of Crosby Stores, Inc., Appellants,

vs.

Irving Trust Co., Trustee Crosby Stores, Inc., Bankrupt, Appellee

Appeal from the District Court of the United States for the District of New Jersey

Decree—Filed Nov. 17, 1932

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the orders of the said District Court of August 31, 1932, and September 15, 1932, in this cause be, and the same are hereby, affirmed, with costs.

Philadelphia, November 17, 1932.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

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In United States Circuit Court of Appeals for the Third Circuit, October Term, 1932

No. 5011

Isaac Gross and Joel Gross, Partners as Gross & Gross, and William Harris, Solicitor for Receivers in Chancery, Appellants,

vs.

Irving Trust Co., Trustee Crosby Stores, Inc., Bankrupt, Appellee

Appeal from the District Court of the United States for the District of New Jersey

Decree—Filed Nov. 17, 1932

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the orders of the said District Court of August 31, 1932, and September 15, 1932, in this cause be, and the same are hereby, affirmed, with costs.

Philadelphia, November 17, 1932.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

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Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1932

No. 680

ORDER ALLOWING CERTIORARI—Filed March 13, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

---

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1932

No. 681

ORDER ALLOWING CERTIORARI—Filed March 13, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1932

No. 682

ORDER ALLOWING CERTIORARI—Filed March 13, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 37,377, 37,378, 37,379. U. S. Circuit Court of Appeals, Third Circuit. Term No. 680. Isaac Gross and Joel Gross, partners as Gross & Gross, solicitors for complainant in chancery, petitioners, vs. Irving Trust Company, trustee Crosby Stores, Inc., bankrupt. Term No. 681. J. S. S. Weisman and John Milton, receivers in chancery of Crosby Stores, Inc., petitioners, vs. Irving Trust Company, trustee Crosby Stores, Inc., bankrupt. Term No. 682. Isaac Gross and Joel Gross, partners as Gross & Gross, and William Harris, solicitors for receivers in chancery, petitioners, vs. Irving Trust Company, trustee Crosby Stores, Inc., bankrupt. Petition for writs of certiorari and exhibit thereto. Filed February 10, 1933. File Nos. 37,377, 37,378, 37,379.

FILE COPY

FEB 10 1933
CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

No. 680 - 681 - 682

IN THE MATTER

*of*

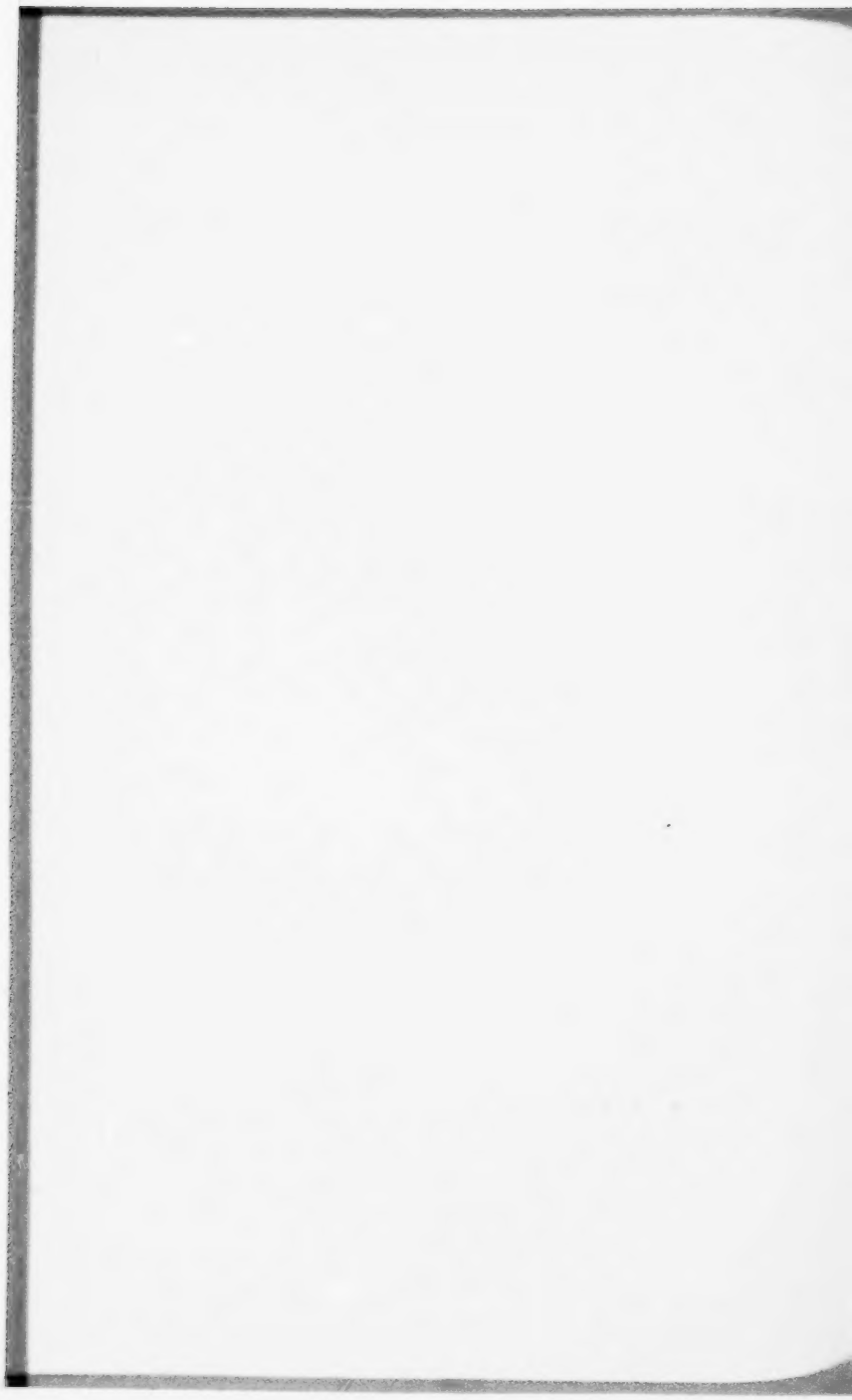
CROSBY STORES, INC.,

*Bankrupt.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

MERRITT LANE,
*Attorney for and of Counsel with Petitioners.*

Pandick Press, Inc., 22 Thames St., New York, U. S. A.



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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

No. .....

IN THE MATTER

*of*

CROSBY STORES, INC.,

Bankrupt.

## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioners, J. S. S. Weisman and John Milton, individually and as receivers of Crosby Stores, Inc., Isaac Gross and Joel Gross, partners as Gross & Gross, who were solicitors of complainant in the proceedings in the Court of Chancery of New Jersey, and Isaac Gross and Joel Gross, partners as Gross & Gross, and William Harris, who were solicitors of J. S. S. Weisman and John Milton, receivers of Crosby Stores, Inc., appointed by the Court of Chancery of New Jersey humbly showeth:

1. On September 3, 1931, a bill was filed in the Court of Chancery of New Jersey against Crosby Stores, Inc., a New Jersey corporation, praying for an injunction against defendant corporation and the appointment of receivers pursuant to the Corporation Act of New Jersey, section 65, 2 C. S. of N. J., p. 1640, as amended P. L. 1931, chapter 221, p. 545, sec. 66, 2 C. S. of N. J., p. 1643; on October 13, 1931, the court granted the statutory injunction and appointed your petitioners J. S. S. Weisman and John Milton as receivers, as a result of which title to all of the corporation's property passed by virtue of the statute to the receivers, sec. 68, 2 C. S. of N. J., p. 1644; *Nottebaum* v. *Leckie*, 31 Fed. (2d) 556 (C. C. A. 3rd); on October 14, 1931, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York against Crosby Stores, Inc., and the Irving Trust Company was appointed receiver in bankruptcy; no ancillary proceedings were instituted in New Jersey; Crosby Stores, Inc., was adjudged a bankrupt by the United States District Court for the Southern District of New York on October 30, 1931; on December 1, 1931, Irving Trust Company was made trustee in bankruptcy; immediately upon the appointment of the receivers in Chancery, they entered into possession of the corporation's property and, under orders of the Court of Chancery, continued the business, which was that of operating department stores, one located in Jersey City and the other in Perth Amboy, New Jersey (Schedule "G," annexed to the trustee's petition, p. 29); in the conduct of the business the receivers purchased and sold merchandise, incurring obligations, paying in part therefor, and, at the time of the appointment of the trustee in bankruptcy, they had in hand $15,628, moneys to the

credit of the Jersey City store, and $3,161.77 to the credit of the Perth Amboy store, and were indebted to receivers' creditors for merchandise purchased in the conduct of the Jersey City store in the sum of $8,832.83 and for consigned merchandise sold at such store $2,382.12, and for operating expenses $683.62, and they were likewise indebted for merchandise purchased by them in the conduct and operation of the Perth Amboy store in the sum of $3,092.58, and for consigned merchandise sold at said store $594.40, and for operating expenses $512.85 (Schedule "H," annexed to the trustee's petition, p. 36; Schedule "G," annexed to the trustee's petition, p. 29).

2. It is impossible to allocate the moneys in the hands of the receivers at the time they ceased to operate the business on December 17, 1931, between proceeds of the liquidation of inventory of which they took possession at the time they were appointed and proceeds of the sale of merchandise purchased by them during the time the business was conducted by them. From the date of the appointment of Irving Trust Company, as receiver in bankruptcy on October 14, 1931, until December 11, 1931, the receiver in bankruptcy and the trustee in bankruptcy acquiesced in the conduct of the business located in New Jersey by the receivers in Chancery. On December 11, 1931, the trustee in bankruptcy presented its petition to the referee in bankruptcy in New York, which resulted in an order to show cause made by the referee on the same date which, in turn, resulted in the making of the order of December 14, 1931, by the Referee, the receivers in Chancery not appearing on the return of the order to show cause, directing the receivers in Chancery to turn over to the Irving Trust Com-

pany all of the property under their control as receivers in Chancery and directing them to file their account with the referee (Schedule "B," annexed to the petition, p. 12). This order of the referee in bankruptcy was designed to make effective a sale which the trustee in bankruptcy had made on December 1, 1931, of all of the assets of the bankrupt (pars. 5, 6, 7, petition of trustee, p. 2).

3. On December 9, 1931, the receivers in Chancery filed their report and account with the Court of Chancery (Schedule "G," annexed to the petition of the trustee, p. 29), which resulted in an order made on that day directed to all the creditors and stockholders and the trustee in bankruptcy requiring them to show cause why the account and report of the receivers should not be approved and proper compensation made (Schedule "C," annexed to the petition of the trustee, p. 14); the trustee, instead of appearing in the Court of Chancery, met the application by the order of the Referee of December 14, 1931 (Schedule "B," annexed to the petition of the trustee, p. 12); on December 14, 1931, the Court of Chancery, disregarding the order of the Referee, made an order approving the receivers' accounts and directing the payment to the receivers of $6,000 for services, to the solicitors of the receivers, $4,000 for services besides costs, and to the solicitors of the complainant $350, besides costs (Schedule "D," annexed to the petition of the trustee, p. 16); the trustee in bankruptcy did not appear upon the hearing in the Court of Chancery; instead it instituted its first proceeding of an ancillary nature in the United States District Court for the District of New Jersey by filing a petition on December 16, 1931 (Schedule "F-1," annexed to the petition of the trustee, p. 21),

which resulted in the order of the United States District Court of the same date directed to the receivers and their solicitors and the solicitors of the complainant in Chancery to show cause before the United States District Court why they should not be directed to turn the assets over to the trustee in bankruptcy and to file their accounts and make application for allowances to the referee in New York; the receivers in Chancery disregarded this order to show cause, and on December 22, 1931, the United States District Court (Schedule "F," p. 26), made an order directing the receivers in Chancery to turn over and deliver to the trustee all of the assets under their control "excepting such moneys as they shall have necessarily expended in and about the preservation of the assets and property of said bankrupt prior to the date of the filing of the involuntary petition in bankruptcy against said bankrupt" (one day) and also restraining them from "in any manner disposing of any and all moneys heretofore received by them and/or any of them pursuant to an order made by said Court of Chancery bearing date the 14th day of December, 1931, wherein they were awarded compensation for services alleged to have been rendered by them or any of them referred to in said order"; the receivers in Chancery after liquidating all their indebtedness, turned over the balance in their hands to the trustee in bankruptcy, but refused to turn over the moneys which they had received for compensation under the orders of the Court of Chancery, instead of doing which they filed a further account with the Court of Chancery (Schedule "H," annexed to the petition of the trustee, p. 36), which resulted in an opinion of Vice Chancellor Fallon, 109 N. J. Eq. 450, and in the filing of the petition of the trustee on July 1, 1932 (p. 1), which resulted in an order

(p. 44), directing your petitioners, J. S. S. Weisman and John Milton, individually and as receivers, to turn over to the bankrupt estate the moneys which they had paid to themselves for compensation under the orders of the Court of Chancery and directing your petitioners Gross & Gross and William Harris to turn over to the trustees in bankruptcy the sum of $4,000 besides their taxed costs which was the sum paid to them as solicitors of the receivers by order of the Court of Chancery, and directing your petitioners Gross & Gross to turn over to the trustee in bankruptcy the further sum of $350 paid to them as solicitors of the complainant in the proceedings pending in the Court of Chancery of New Jersey which resulted in the appointment of receivers in Chancery.

4. The opinion of the District Court is found on page 43 of the record. An appeal was taken by your petitioners to the Circuit Court of Appeals for the Third Circuit, which, on November 17, 1932 (p. 69), affirmed the order of the District Court. The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 61 Fed. (2d) 812. Both courts rested their decision upon a decision of the Circuit Court of Appeals for the Third Circuit in *Silberberg* v. *Ray Chain Stores, Inc.*, 54 Fed. (2d) 650, affirmed 58 Fed. (2d) 766, certiorari denied, U. S. Supreme Court Advance Opinions, No. 1, October, 1932 Term, p. 35, 53 Sup. Ct. 83, 77 L. Ed. 35; *In re*: Diamond's Estate (C. C. A. 6), 259 Fed. 70, 74; *Moore* v. *Scott* (C. C. A. Ninth), 55 Fed. (2d) 863. Application was made to this court for a certiorari in *Silberberg* v. *Ray Chain Stores, Inc.*, which was denied October 17, 1932, U. S. Supreme Court Advance Opinions, No. 1, October, 1932 Term, p. 35, 53 Sup. Ct. 83,

77 L. Ed. 35. Since the decision of the Ray Chain Stores case by the Circuit Court of Appeals for the Third Circuit, the Court of Chancery of New Jersey has denied its force and effect as controlling that court and has intimated that it would not consider itself bound by any authority of a lower rank than this court. *Isenberg* v. *Kimberly Phonograph Co.*, 111 N. J. Eq. 195 (V. C. Buchanan). The attitude of the Court of Chancery is well illustrated by this case and *Perfection Garment Co.* v. *Crosby Stores, Inc.*, 109 N. J. Eq. 450 (V. C. Fallon); *Shachat* v. *Standard Auto Supply Co.*, 106 N. J. Eq. 105 (V. C. Church); *Colton* v. *Bank Shares Corporation*, 108 N. J. Eq. 417 (V. C. Backes).

5. The writ of certiorari is applied for because of the following reasons:

(a) The Circuit Court of Appeals for the Third Circuit decided an important question arising under the Bankruptcy Act in such a manner that irreconcilable conflict has been created between the United States District Court in Bankruptcy and the Court of Chancery of New Jersey, which can only lead to unseemly disputes and cross proceedings in contempt against receivers appointed by the state courts and trustees acting under the authority of the court of bankruptcy. The New Jersey Court of Chancery has repeatedly announced that, despite the filing of a petition in bankruptcy within four months after the appointment by it of a receiver, it retains jurisdiction to settle the accounts of its receivers and to provide for the payment of their debts and their compensation. The New Jersey Court of Chancery has held that it would not direct its receivers to turn over assets to a trustee in bankruptcy until provision had been made for the liquidation of the

debts of the receivers and the payment of compensation to the receivers and counsel, and that it would consider any attempt by any official of the court of bankruptcy to interfere with it's winding up of the affairs of the receivership pending before it as a contempt of the Court of Chancery. The New Jersey Court of Chancery has repeatedly announced that in its opinion it is the duty of the trustee in bankruptcy to appear before the Court of Chancery and to petition that court to turn over the assets after the winding up of the affairs of the receivership and that, if dissatisfied with the action of the Court of Chancery, his recourse is ultimately to this Court.

The New Jersey Court of Chancery will not recognize the opinion of any Federal Court, except this Court, and the imminency of the conflict is indicated by the following letter written by the Vice Chancellor who decided the Crosby Stores matter in the New Jersey Court of Chancery after he was advised of the decision of the Circuit Court of Appeals in the Ray Chain Stores Case:

> "I write to suggest that someone in interest in the questions involved in said case should arrange to have my decision in the case of Perfection Garment Co. *v.* Crosby Stores, Inc. reviewed by the Court of Errors and Appeals of this State, and, if need be, thereafter by the United States Supreme Court. I am prompted in writing to you at this time about the matter because of another case of like kind, which is now brought to my attention—Marvel Upholstering Co. I have in mind also another case, some time ago, Regalite Corporation of America, in which Mr. Philip J. Miele was receiver and Mr. Aaron Melniker was counsel. In order to avoid further conflict between the Federal courts and the State courts, the matter should be finally

> adjudicated after the enlightenment of not only members of the bar, but members of the several courts throughout the country. The case of Perfection Garment Co. *v.* Crosby Stores, Inc., particularly because of several of the questions involved, would be an excellent case to be reviewed."

And by his opinion in *Moore* v. *Federal Metal Bed Co.*, 110 N. J. Eq., 217, at 219; and by his reference to his opinion in the Crosby Stores case, in *Umland* v. *United Public Service Co.*, 11 N. J. Eq., 563, at page 573.

The case was affirmed by the court of last resort in New Jersey, 111 N. J. Eq., 613 (Nov. 23, 1932). While the Court delivered its own opinion, it did not criticize the language of the Court below.

The trustee in bankruptcy declined to appeal the order made by the New Jersey Court of Chancery in the Crosby Stores, Inc. matter, and instead instituted the proceedings of a summary nature which resulted in the instant case in the United States District Court for the District of New Jersey.

(b) As a result of the decision by the Circuit Court of Appeals for the Third Circuit, it will be impossible, for practical purposes, for receivers appointed by State courts to do anything more with the property of a corporation than to hold it for a period of four months after the appointment, for the effect of the decision of the Circuit Court of Appeals for the Third Circuit is that an adjudication in bankruptcy, no matter how long after the filing of the petition, if the petition be filed within four months after the appointment of a receiver, is to undo and render void every act performed by the receiver after the filing of the petition. And this would be true, despite the fact that the

receiver is wholly unaware that a petition has been filed in a United States District Court, sitting in bankruptcy, somewhere in the United States. As a result of the decision of the Circuit Court of Appeals for the Third Circuit, State courts sitting in equity, would be prevented, for all practical purposes, from authorizing receivers' certificates and the incurring of debts, for it is hardly likely that a court will authorize its receivers to incur debts or issue certificates without having the power to ultimately provide for the payment of their debts. Indeed, the decision of the Circuit Court of Appeals for the Third Circuit may give rise to the claim that every act performed by the receiver, every transfer of title by him, and the like is void and of no effect, if there is ultimately an adjudication upon a petition in bankruptcy filed within four months of the appointment of the receiver.

(c) It is submitted that the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re Jack Stolkin*, 42 F. (2d) 829 (C. C. A. 2nd 1930). It is further submitted that the Circuit Court of Appeals for the Third Circuit and the District Court, as well as the Circuit Court of Appeals for the Ninth Circuit, misapprehended the effect of the decisions of this court in *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645; *Straton* v. *New*, 283 U. S. 318, 75 L. Ed. 1060, and *Lion Bonding Co.* v. *Karatz*, 262 U. S. 640, 67 L. Ed. 1151, and failed to give due weight to the decisions of this Court in *In re Watts*, 190 U. S. 1, 47 L. Ed. 933, *Galbraith* v. *Vallely*, 256 U. S. 46, 65 L. Ed. 823, *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413, which line of cases the New Jersey Court of Chancery has followed.

It is submitted that the decisions of this Court were never intended to prevent a State court from winding up it's connection with a receivership and from compensating its officials, and nothing but a decision of this Court can end the unseemly conflict on that issue now current between the United States District Court for the District of New Jersey and the New Jersey Court of Chancery.

WHEREFORE your petitioners respectfully pray that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record of all proceedings of the said United States Circuit Court of Appeals for the Third Circuit, and of the District Court of the United States for the District of New Jersey, and all proceedings in both courts, to the end that the said case may be reviewed and determined by this Court, as provided by law, and that your petitioners may have such further and other relief or remedy in the premises as to this court may seem appropriate, and that the said decree of the United States Circuit Court of Appeals for the Third Circuit, affirming the decree of the United States District Court for the District of New Jersey may be set aside and that the decree of the United States District Court, for the District of New Jersey, may be set aside and the record remitted to that court with instructions to enter a decree dismissing the proceedings, and your petitioners will ever pray.

MERRITT LANE,
Attorney for and of Counsel with
Petitioners.

## BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

### I.

The memorandum of the United States District Court is found on page 43 of the record and is not reported. The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 61 Fed. (2d) 812 and is printed on page 65. The opinion of the District Court in the Ray Chain Stores case is reported in 54 Fed. (2d) 650. The opinion of the Circuit Court of Appeals for the Third Circuit in the same case is reported in 58 Fed. (2d) 766. The denial of the writ of certiorari by this court in the same case is reported 77 L. Ed. 35, U. S. Supreme Court Advance Opinions No. 1, October 1932 Term, page 35; 53 Sup. Ct. 83.

### II.

#### Jurisdiction.

The jurisdiction of this court is rested on section 240 of the Judiciary Code as amended by the act of February 13, 1925, sec. 1, 43 Statutes 938, sec. 347, Title 28, U. S. C. A. 359. The date of the decree of the United States Circuit Court of Appeals for the Third Circuit to be reviewed is November 17, 1932.

### III.

The grounds upon which the jurisdiction of this court is invoked are fully set forth in paragraph 5 of the petition, page 7.

## IV.

### Statement of the Case.

The case is fully stated in the petition, paragraphs 1 to 4, pages 2 to 6.

## V.

### Specifications of Error.

1. The United States Circuit Court of Appeals erred in holding that it had jurisdiction in bankruptcy in a summary proceedings to direct the receivers in Chancery, counsel for the receivers and counsel for the complainant to turn over to the trustees of the bankrupt estate fees which had been allowed to them for compensation for services rendered in the proceedings in the Court of Chancery which had resulted in the appointment of receivers under the statute of New Jersey.

2. The United States Circuit Court of Appeals erred in not holding that the Court of Chancery, which had originally acquired jurisdiction, was competent to hear and determine all questions with respect to the administration of the estate while in the control of the Court of Chancery, through its receivers, and to wind up their accounts, to fix their fees and the fees of their counsel and the solicitor of the complainant, and erred in holding that the mere filing of the petition in bankruptcy superseded all jurisdiction of the Court of Chancery.

## Argument.

1. The decision below is in conflict with the established State law and the decisions of this court and also the Federal courts.

2. The decision below unduly interferes with the right of the State court to wind up the affairs of estates which have come to its possession so that its receivers and their counsel may be compensated and what remains turned over to the trustee in bankruptcy.

3. The decision below destroys the independence of the State courts in violation of State rights.

4. The decision below was erroneous in that it held that the District Court might proceed in a summary proceeding in bankruptcy against the receivers, receivers' counsel and the solicitors of the complainant in the State court, they being adverse claimants.

The District Court concluded, and its conclusion was sustained by the Circuit Court of Appeals, that as soon as the adjudication in bankruptcy title to the bankrupt's estate vested in the trustee as of the date of the filing of the petition and the jurisdiction of the Court of Chancery of New Jersey was superseded as of the date of filing the petition, and that court had no power to wind up the affairs of the estate which had come to it at a time when it had complete jurisdiction, compensate its receivers and their counsel and the solicitor of the complainant and direct the receivers to turn over what might remain to the trustee in bankruptcy. It further held that the District Court had power to proceed

against the receivers, receivers' counsel and solicitors for the complainant in a summary proceeding in bankruptcy notwithstanding the fact that they were adverse claimants of the funds in their possession which had been paid to them by order of the State court and notwithstanding the fact that the offices of the State court had what were in the nature of liens upon the assets of the trust estate in their charge. *Seidler* v. *Branford Restaurant*, 97 N. J. Eq. 153, affd. 97 N. J. Eq. 531; *Jeffers* v. *N. J. and P. R. Co.*, 86 N. J. Eq. 68; *Chesapeake & Ohio R. R. Co.* v. *Atlantic Transportation Co.*, 62 N. J. Eq. 751; *Petersburg Sav. Ins. Co.* v. *Dellatorre*, 70 Fed. 643 (C. C. A. 5th).

While it is true that an adjudication in bankruptcy places the bankrupt's assets in *custodia legis* for certain purposes as of the date of the filing of the petition, it does not follow that the prior actual possession and jurisdiction of a State court is suspended for all purposes. The orderly conduct of administration between successive jurisdictions requires at least that the court having prior jurisdiction be permitted to wind up the proceedings before it, to compensate its officers, and to discharge their obligations.

A contrary view will result in chaos. A receiver appointed by a State court may, under direction of the court, carry on the corporate business, sell property, personal and real, incur obligations upon receiver's certificates, and incur other debts. A petition in bankruptcy may have been filed shortly before the lapse of the four-month period and adjudication may follow some time later. Under the decision of the lower courts, it is entirely clear I submit that every act of the receiver after the filing of the petition is utterly void, and this despite the fact that the receiver was unaware of the filing of the petition. And since it is

unlikely that any court will authorize its receiver to issue certificates, incur debts, or proceed with the administration of the receivership estate without having the power to ultimately provide for the payment of the receiver's certificates and debts and to compensate the receiver and his counsel, the practical effect of the lower courts' decision is to, in a large part, emasculate equity or statutory receiverships, in State Courts.

Moreover the Chancery Receivers upon their appointment gave bond conditioned that they would account in Chancery. How under the circumstances can they comply with the condition of their bond?

The opinion of the District Court in the Ray Chain Stores Case, 54 Fed. (2nd) 650, affirmed 58 Fed. (2nd) 766, certiorari denied, 77 L. Ed. 35, U. S. Supreme Court Advance Opinions, No. 1, October, 1932 Term, p. 35, 53 Sup. Ct. 83, upon which the decision below rests intimates that even the acts performed by the receiver prior to the filing of a petition within four months of his appointment are at least reviewable by the bankruptcy court, because the appointment of a receiver itself is an act of bankruptcy and void as against the trustee. Needless to say, the adoption of such a view would immediately result in the elimination of all equity or state statutory receiverships.

In order to preserve their receivership jurisdiction and insure the orderly administration between successive courts, the State courts have reached a conclusion contrary to that reached by the court below. *Mauran* v. *Crown Carpet Lining Co.*, 23 R. I. 344, 50 Atl. 387 (1901); *Shannon* v. *Shepard Mfg. Co.*, 42 A. B. R. 12, 230 Mass. 224, 119 N. E. 768 (1918); *Perfection Garment Co.* v. *Crosby Stores, Inc.*, 109 N. J. Eq. 450 (Ch. 1932); *Shachat* v. *Standard Auto Sup-*

*ply Co.*, 106 N. J. Eq. 105 (Ch. 1930); *Colton* v. *Bank Shares Corporation of the United States*, 108 N. J. Eq. 417 (Ch. 1931); *Kennedy* v. *American Tanning Co.*, 81 N. J. Eq. 109-111 (Ch. 1913); *Cudahy Packing Co.* v. *New Jersey Dairy Products Co.*, 90 N. J. Eq. 541 (Ch. 1919).

In *Colton* v. *Bank Shares Corporation*, 108 N. J. Eq. 417, Vice Chancellor Backes ably expressed the position of the State court:

> "On May 2d, 1930, Samuel I. Kessler was appointed receiver of the defendant company. On June 6th, on its own petition the company was adjudged a bankrupt by the federal court in New York and on August 14th the Irving Trust Company was appointed trustee. The receiver has filed his account, asks its approval, the fixing of his compensation and that of his counsel and direction to pay the residue to the trustee. On June 15th, 1931, the federal court (a referee) ordered the receiver individually to file his account in that court together with a verified statement of his services and expenses as receiver to the date of the adjudication and that he forthwith turn over the estate in his hands to the trustee. New York counsel of the trustee, who was also the attorney of the petitioner in bankruptcy, appeared on this motion, *pro hac vice*, and, presuming to appear specially objected to the court making allowances, claiming that the jurisdiction resides in the federal court. A compliance with the order of the federal court by our receiver without the consent of this court would be contempt of this court. A more orderly and courteous procedure would have been to have applied to this court for directions to its receiver; and, according to the authorities, that is the exclusive course. The course adopted by counsel for the trustee is unwarranted and his statement in court that

a non-compliance with the order of the referee might result in our receiver landing in jail is offensive. The federal court may well be depended upon to restrain such threatened abuse of power. The practice as laid down in Shachat *v.* Standard Auto Supply Co., 106 N. J. Eq. 105, is that indicated *In re* Watts & Sachs, 190 U. S. 1, which has ever since been the guide of courts and lawyers in this state, that the court of primary jurisdiction may supervise the administration of its receivers and fix their compensation, and it will be adhered to. The recent case of Isaacs *v.* Hobbs Tie & Timber Co., 282 U. S. 734, cited by the trustee, does not touch that question. That was a foreclosure of mortgage suit brought after a trustee was appointed and the court held it to be not maintainable; that as the mortgaged property was in the hands of the bankruptcy court, the right to a lien and its enforcement could only be handled in that court. The opinion deals with the title to bankrupt's property and not with the orderly judicial administration of bankrupt's assets, and restates the familiar rule that obtains in all courts of equity and upholds the authority of this court as the court of original jurisdiction to dispose of property in its custody according to law: '* * * when a court of competent jurisdiction takes possession of property through its officers this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property.' This is a plain recognition of the power of this court to control the disposition of property in *custodia legis* and that right must be accorded by the bankruptcy court until this court has set its house in order. The principles of comity in

> judicial conduct are informatively discussed by Mr. Justice Moody in Wabash Railroad Co. *v.* Adelbert College, 208 U. S. 38. The duty of this court under our corporation act was to administer the estate while in its possession and its duty now is to pass the assets over to the federal court, whose jurisdiction has superseded ours under the Bankruptcy Act, after liquidating the expense attending its administration in this court. This makes for convenient and orderly conduct of administration between successive jurisdictions, and is supported by the weight of authority and has been followed by both state and federal courts as the appropriate course since *In re* Watts & Sachs."

In *Kennedy* v. *American Tanning Co.*, 81 N. J. Eq. 109, Vice Chancellor Garrison said:

> "Without going deeply into the matter, I cannot conceive it possible that the bankruptcy court would contend that it was entitled to take over the property which has been in *custodia legis* in this court until this court should have reimbursed those who had, under its direction or with its sanction expended moneys for the preservation of the property in question. Very different questions arise where moneys are to be paid out for any other purposes, and I shall not herein discuss those other questions."

This Court and lower Federal courts have on many occasions recognized the propriety of the view of the State courts in decisions which, it is submitted, are in conflict to the decision of the court below in the case at bar. In *In re* Watts, 190 U. S. 1, 35, 47 L. Ed. 933, 944 (1902), Chief Justice Fuller, speaking of this Court, said:

> "It has been already assumed that the bankruptcy proceedings operated to suspend the further

> administration of the insolvent's estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its receiver and close its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way."

See also *Carling* v. *Seymour Lumber Co.*, 113 Fed. 483, 491 (C. C. A. 5th, 1902), certiorari denied 186 U. S. 484, 46 L. Ed. 1261 (1902); *In re Dayton Coal & Iron Co.*, 291 Fed. 390 (Tenn., 1922); *In re Jack Stolkin*, 42 F. (2d) 829 (C. C. A. 2d, 1930); *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413 (1902); *Galbraith* v. *Vallely*, 256 U. S. 46, 65 L. Ed. 823 (1921); *Acme Harvester Co.* v. *Beckman Lumber Co.*, 222 U. S. 300, 56 L. Ed. 208 (1911).

In *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413 (1902), the bankruptcy court ordered Comingor, an assignee who had been acting under a State statute and who had filed his accounts in the State court, to turn over to the trustee in bankruptcy sums retained by him as compensation for his counsel and himself. This order was reversed on appeal. Referring to the dispute as to the fixing of compensation for the assignee and his counsel, this court said:

> "If the jurisdiction of the district court was not consented to, then the state court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there."

In the recent case of *In Re Jack Stolkin*, 42 F. (2d) 829 (1930), the Circuit Court of Appeals for the Second Circuit reviewed the pertinent opinions of this Court and expressly approved the doctrine of the Comingor case. If an assignee

for the benefit of creditors is entitled to have his allowances determined by the State court despite supervening bankruptcy, then *a fortiori* a receiver appointed by a State court is entitled to have the allowances to his counsel and himself fixed by the court which appointed him.

The District Court in the Ray Chain Store case and the court in *Moore* v. *Scott*, 55 F. (2d) 863 (C. C. A. 9th, 1932), upon which the Circuit Court of Appeals below rested its opinion in the Ray Chain Store case, based their conclusion upon *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645 (1931); *Straton* v. *New*, 283 U. S. 318, 75 L. Ed. 1060 (1931); *Lion Bonding Co.* v. *Karatz*, 262 U. S. 640, 642, 67 L. Ed. 1151 (1923). These decisions, I submit, are controlling. The Isaacs case, as stated by Mr. Justice Roberts, involved solely the following question:

> "After the bankruptcy court has acquired jurisdiction of the estate of the bankrupt and the referee therein has entered an order requiring sale, by the trustee, of all of the property of the bankrupt but before the trustee has taken any steps to sell land (part of such estate) entirely located in another judicial district, can a suit to foreclose a valid mortgage thereon be commenced and an order of sale thereunder be made over the objection of the trustee, by the court of the latter district?"

Clearly the answer must be in the negative, and this Court so held. This Court had no occasion to consider and did not consider, whether, upon supervening bankruptcy, a State court may put its house in order by fixing the allowance of its receiver and his counsel and by settling his accounts. Similarly, the Straton and Lion Bonding cases did not involve the situation here presented and accordingly are not controlling.

The District Court in the Ray Chain Store case placed considerable reliance upon Mr. Justice Roberts' language in the Straton case to the effect that upon the filing of a petition in bankruptcy, followed by an adjudication, the jurisdiction of the bankruptcy court is exclusive from the date of the filing of the petition. In *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 56 L. Ed. 208 (1911) this Court, speaking through Mr. Justice Day, used similar language, but nevertheless held that an attachment suit filed in a State court after the petition in bankruptcy had been filed could be proceeded with where the bankruptcy court had not moved in the bankruptcy suit for upwards of five years. In the course of its opinion this Court said:

> "The case presented therefore shows that the bankruptcy court, upon the filing of the petition in bankruptcy, found an outstanding creditors' agreement under which it was proposed to administer and distribute the estate. It declined to appoint a receiver; it recognized the propriety of the proceedings of the creditors' committee; it received reports of the creditors' committee, and allowed it for years to go on in the operation of the property, to mature a plan for the settlement of the debts outside of the court, and not contemplated in the bankruptcy act. The creditors in large numbers signified a purpose to take stock in a reorganization and for more than five years after the time of the filing of the petition, it was found by the Supreme Court of Missouri, had made no attempt to adjudicate the corporation a bankrupt, or proceed to the settlement of the estate under the requirements of the act."

The court further said:

> "It is suggested that even now the bankruptcy court may proceed to an adjudication, but this sug-

> gestion is at war with all that has been done with the knowledge and sanction of the district court. As we have seen, the property to be administered in the bankruptcy court is that which belonged to the bankrupt at the filing of the petition, and then subject to his debts. This property can never be recovered. With the sanction of the district court much of it has been sold, its character has been changed, and it has been dealt with by the creditors' committee regardless of the provisions of the bankruptcy law. Many of the creditors have signified their purpose to adjust their claims by taking stock in a reorganization, or 50 cents on the dollar, of the amount of their claims. The whole proceedings makes it clear that the district court denied the adjudication and declined to exercise its jurisdiction as a bankruptcy court."

It is clear, I submit, from the opinion of this Court in the Acme Harvester case, that a State court is not divested of jurisdiction for all purposes after filing of a petition in bankruptcy. If it were then it would be wholly immaterial whether the bankruptcy court remained inactive for a long period of time for the mere pendency of the bankruptcy proceeding would deprive other courts of jurisdiction. At least the petition in bankruptcy would have to be dismissed before any act of another court could have any validity. The petition in the Acme Harvester case was still pending, however, at the time the State court proceeded. Similarly, if the theory of the lower court's decisions is correct then there would be no justification for the decision in *In re Oakland Lumber Co.*, 174 Fed. 634 (C. C. A. 2d, 1909), and like decisions refusing to appoint a receiver in bankruptcy upon the filing of a petition on the ground that the property was in the hands of an assignee or receiver

under State law. The refusal of the court of bankruptcy to appoint a receiver would leave the property under the control of a person whose acts would be void.

The decision of the lower courts in the instant case is not supported by any express language in the Bankruptcy Act and is in disregard of the principles underlying the decisions dealing with conflicts of jurisdiction between successive courts. Cf. *Harkin* v. *Brundage*, 276 U. S. 36, 72 L. Ed. 457 (1928); *Wabash R. R.* v. *Adelbert College*, 208 U. S. 38, 54, 52 L. Ed. 379 (1908); *Murphy* v. *John Hoffman Co.*, 211 U. S. 562, 568, 53 L. Ed. 327 (1909). In *In Re Watts, supra*, Chief Justice Fuller said:

> "The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit; but that rule can have only a qualified application where winding-up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity, and accordingly the receiver of the district court brought his appointment to the knowledge of the Floyd circuit court and requested the delivery of the assets."

The decision of the lower court not only is in disregard of that comity referred to by Chief Justice Fuller, which is so essential to our system of dual sovereignty, but is in conflict with established rules of law as set forth by this Court, inferior Federal courts and State courts. Due regard for the orderly administration of insolvent corporate affairs and due regard for the jurisdiction of State courts requires that the court having prior actual possession be

at least permitted to compensate its receiver and his counsel and settle its receiver's accounts before turning the assets over to a court of bankruptcy. There is nothing in the bankruptcy act which compels a contrary conclusion. Indeed, it may be questioned whether Congress could constitutionally enact that a bankruptcy court has the right to in effect, by force, take away property from a State court which has appointed a receiver who has taken possession, acquired title under State law and administered the corporate affairs without permitting the state court to compensate its receiver and his counsel and settle its receiver's accounts.

In a recent note in 41 *Yale Law Journal*, 1234 (1932), the author discusses the Ray Chain Store case and the conflict between the New Jersey Court of Chancery and the Federal Courts.

That conflict is so well expressed by Vice Chancellor Buchanan in *Isenberg* v. *Kimberley Phonograph Co. of N. J.*, 111 N. J. E. 195, as that I quote from it:

> "The trustees in bankruptcy appear, by their solicitors, and object not only to the making of the order for allowances in the amount and in the form asked by the receiver, but to the making of any allowances whatever by this court; their contention being that this court is without power to make such allowances—under the authority of Isaacs *v.* Hobbs Tie & Timber Co., 282 U. S. 734; Silberberg *v.* Ray Chain Stores Co. Inc., 54 Fed. Rep. (2d) 650; affirmed 58 Fed. Rep. (2d) 766; Moore *v.* Scott, 55 Fed. Rep. (2d) 863; Lion Bonding Co. *v.* Karatz, 262 U. S. 640, and Bloch *v.* Bloch, 86 N. Y. Supp. 1047.
>
> The proposition that this court, after an adjudication of bankruptcy, is without jurisdiction or

> power to fix the compensation of its receiver duly appointed on adjudication of insolvency prior to any bankruptcy proceedings, is one in which this court cannot concur and to which it cannot yield unless upon explicit and controlling authority. In the view of this court, the federal legislation does not purport, expressly or impliedly, to effect any such result; and even if it did, the constitutional validity of such an attempt would be, to say the least, open to serious question."

In the case at bar the bankruptcy receiver permitted the receivers of the State court to proceed to operate the business of the defendant corporation, sell and purchase merchandise and incur obligations. The receiver of the bankruptcy court stood by and permitted the receivers of the State court and the State court to involve themselves.

It is impossible to determine how much of the moneys in the hands of the receivers in Chancery was derived from the sale of inventory which came to their possession at the time of their appointment and how much was derived from the sale of merchandise which they purchased. Certainly the trustee in bankruptcy is not entitled to the proceeds of the sale of merchandise which the receivers of the State Court purchased, those receivers being an entity, created by the statute of New Jersey, separate and apart from the corporation and holding title for the benefit of the creditors and stockholders of the corporation and adverse to the corporation as such. By the conduct of the receiver and trustee in bankruptcy in standing aside, they at least placed the receivers in Chancery in no worse position than had they been ancillary receivers.

In *Loeser* v. *Dallas*, 192 Fed. 909, the Circuit Court of Appeals, 3rd Circuit, speaking by Judge Buffington, said:

"The amendment of June 25, 1910, to the bankrupt law, providing for ancillary proceedings in bankruptcy, simply recognized by statute a practice which courts of bankruptcy, in pursuance of principles of equity and comity, had theretofore generally exercised. In the nature of this an ancillary receiver must be subject alone to, and obey the orders of, that court of which he is an officer. So obeying, it follows that to it alone must he account. Any other course would breed confusion in administration and go far toward making the exercise of ancillary jurisdiction impracticable; for if a court, in pursuance of comity, undertakes to exercise ancillary jurisdiction by administering local assets, which it alone has power and jurisdiction to administer, it follows that its hand must be free to administer by its own officer and to exact from him the full measure of duty. Such executive work it can only secure from an officer answerable to it alone. Kirker *v.* Gwings, 98 Fed. 511, 39 C. C. A. 132; Sands *v.* Neely, 88 Fed. 133, 31 C. C. A. 424; In re Isaacson, 174 Fed. 406, 98 C. C. A. 614; Ames *v.* U. P. Ry. Co. (C. C.), 60 Fed. 966.

"These recognized principles and practices in ancillary proceedings we must assume Congress had in view in passing the amendment in question. When in such cases the receiver of an ancillary court makes his accounting to his own court, that court meets all requirements of comity to the primary court by affording the latter, through its proper officer, the opportunity to question the correctness of the accounting to the ancillary court. That was done in this case, and the contention that each creditor in the court of primary jurisdiction had to have notice, and, because the ancillary court had in its possession no list or knowledge of who such creditors are, that therefore the ancillary receiver must file his

account in the primary court, is a non sequitur, based on the assumption that Congress, while authorizing ancillary proceedings, coupled therewith an extra territorial accounting to which no court should subject its own receiver. As this petition has subjected the ancillary receiver to the expense of contesting the petition in this court, the court below is authorized to make such proper reimbursing allowance for such expense to its receiver from the fund in his hands as it deems proper.

"The order of the District Court is affirmed, with costs, and the record will be remanded, with instruction to that court to allow said costs, and a reasonable counsel fee to the ancillary receiver's counsel for his services in this court, to be paid out of the balance of moneys appearing by his report to be in the hands of said receiver."

Judge Buffington states that the amendment providing for ancillary proceedings simply recognized by statute a practice which courts of bankruptcy have followed in pursuance of principles of equity and comity. He held that an ancillary receiver can be subject only to the order of the Court which appointed him. The analogy between the Chancery receivers in the case at bar and ancillary receivers is apparent.

The Ray Chain Store case is not applicable as to its facts to the case at bar. In that case ancillary receivers in bankruptcy were appointed, while in this case no ancillary receivers were appointed and the Chancery receivers either had to continue to act substantially as ancillary receivers or abandon the property.

I respectfully submit that the decisions of the Circuit Court of Appeals for the Third Circuit are in conflict with

the decision of the Circuit Court of Appeals for the Fifth Circuit, *Loveless* v. *Southern Grocer Co.*, 159 Fed. 415; *In re Conservative Mortgage and Guaranty Company*, Circuit Court of Appeals for the Sixth Circuit, 24 Fed. Rep. (2nd) 38, as well as *In re Jack Stolkin*, Circuit Court of Appeals for the 2nd Circuit, 42 Fed. (2d) 829.

I further submit that the decision of the Circuit Court of Appeals to the effect that the proceedings against the receiver, his counsel and the counsel for the complainant should be of a summary nature is in conflict with the opinions of this court in *re Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413; *Galbraith* v. *Vallely*, 256 U. S. 46, 65 L. Ed. 823; *In re Jack Stolkin* (C. C. A. 2, 42 Fed. (2) 829). The District Court in the Ray Chain Store case, 54 Fed. (2d) 650, seemed to think that the proceedings would have to be of a plenary nature, but the Circuit Court of Appeals in the instant case has distinctly held that the proceedings could be of the summary nature indulged in in the case at bar, p. 67.

**It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and that a writ of certiorari should be granted.**

Respectfully submitted,

MERRITT LANE,
Attorney for and of Counsel
with Petitioners.

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APR 11 19

CHARLES ELMORE C

# Supreme Court of the United States

OCTOBER TERM, 1932.

## No. 680

ISAAC GROSS AND JOEL GROSS, PARTNERS AS GROSS & GROSS, SOLICITORS FOR COMPLAINANT IN CHANCERY, PETITIONERS,

*vs.*

IRVING TRUST COMPANY, TRUSTEE CROSBY STORES, INC., BANKRUPT

## No. 681

J. S. S. WEISMAN AND JOHN MILTON, RECEIVERS IN CHANCERY OF CROSBY STORES, INC., PETITIONERS,

*vs.*

IRVING TRUST COMPANY, TRUSTEE CROSBY STORES, INC., BANKRUPT

## No. 682

ISAAC GROSS AND JOEL GROSS, PARTNERS AS GROSS & GROSS, AND WILLIAM HARRIS, SOLICITORS FOR RECEIVERS IN CHANCERY, PETITIONERS,

*vs.*

IRVING TRUST COMPANY, TRUSTEE CROSBY STORES, INC., BANKRUPT

# BRIEF FOR PETITIONERS.

MERRITT LANE,
*Of Counsel with Petitioners.*

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

## No. 680

ISAAC GROSS AND JOEL GROSS, PARTNERS AS GROSS & GROSS, SOLICITORS FOR COMPLAINANT IN CHANCERY, PETITIONERS,

*vs.*

IRVING TRUST COMPANY, TRUSTEE CROSBY STORES, INC., BANKRUPT

## No. 681

J. S. S. WEISMAN AND JOHN MILTON, RECEIVERS IN CHANCERY OF CROSBY STORES, INC., PETITIONERS,

*vs.*

IRVING TRUST COMPANY, TRUSTEE CROSBY STORES, INC., BANKRUPT

## No. 682

ISAAC GROSS AND JOEL GROSS, PARTNERS AS GROSS & GROSS, AND WILLIAM HARRIS, SOLICITORS FOR RECEIVERS IN CHANCERY, PETITIONERS,

*vs.*

IRVING TRUST COMPANY, TRUSTEE CROSBY STORES, INC., BANKRUPT

(Italics, etc., mine except where otherwise noted)

# BRIEF FOR PETITIONERS.

## I.

## The Opinions Below.

The memorandum of the United States District Court is printed (p. 43) not reported, filed Dec. 6, 1932.

The opinion of the United States Circuit Court of Appeals is printed page 63 and is reported in 61 Fed. (2d) 812.

Both opinions relied upon the prior opinions of the same District Court in *Silberberg* v. *Ray Chain Stores, Inc.*, 54 Fed. (2d) 650, and the same Circuit Court of Appeals, 58 Fed. (2d) 766, certiorari denied, 53 Sup. Ct. 83, 77 L. Ed. 35 (U. S. Supreme Court Adv. Opinions No. 1, Oct. 1932 Term, p. 35).

These cases are here on three writs of certiorari granted March 13, 1933 (U. S. Supreme Court Advance Opinions, No. 10, p. 658, 77 L. Ed. 658, 53 Sup. Ct. 507) to review an order of the United States District Court for the District of New Jersey, filed August 31st, 1932 (p. 44), modified by an order of September 15th, 1932 (p. 46), affirmed on appeal by the United States Circuit Court of Appeals, for the Third Circuit, by three orders entered November 17, 1932 (pp. 67, 68). Three separate appeals were taken from the order of the District Court of August 31st, 1932 (p. 44)—one by petitioners, J. S. S. Weisman and John Milton individually and as receivers of Crosby Stores, Inc., from that portion of the order directing them individually and as receivers to turn over to the trustee in bankruptcy of Crosby Stores, the sum of $6,000 which had been paid to them as receivers jointly as compensation under an order of the Court of Chancery of New Jersey (p. 48); another by petitioners Isaac Gross and Joel Gross, partners, as Gross & Gross from that portion of the order directing them to turn over to the trustee in bankruptcy the sum of $350 paid to them by order of the Court of Chancery of New Jersey as compensation as solicitors of the complainant in a receivership proceeding pending in that court (p. 48); the third by petitioners Isaac Gross and Joel Gross, partners, as Gross & Gross, and William Harris from that portion of the order directing

them to pay to the trustee in bankruptcy the sum of $4,000 besides taxed costs paid to them by order of the Court of Chancery of New Jersey as compensation for their services as solicitors for the receivers of Crosby Stores, Inc. in the Court of Chancery of New Jersey (p. 47).

## II.

### Jurisdiction.

The jurisdiction of this Court is rested on sec. 240 of the Judicial Code, as amended by the act of February 13, 1925, sec. 1, 43 Statutes 938, sec. 347, Title 28, U. S. C. A. 359. The date of the decree of the United States Circuit Court of Appeals for the Third Circuit to be reviewed is November 17, 1932.

## III.

### The grounds upon which the jurisdiction of this Court is invoked.

The grounds upon which the jurisdiction of this Court is invoked are, as stated in paragraph 5 of the petition for the writs, summarized:

(a) The Circuit Court of Appeals decided an important question arising under the Bankruptcy Act in such a manner as that irreconcilable conflict has been created between the United States District Court in Bankruptcy and the Court of Chancery of New Jersey, which can only lead to unseemly disputes and cross-proceedings in contempt

against receivers appointed by the State court and trustees acting under the authority of the court of bankruptcy.

(b) As a result of the decision by the Circuit Court of Appeals, it will be impossible, for practical purposes, for receivers appointed by State courts to do anything more with the property of a corporation in receivership than to hold it for a period of four months after the appointments, for the effect of the decision is that an adjudication in bankruptcy, no matter how long after the filing of the petition, if the petition be filed within four months after the appointment of a receiver, is to undo and render void every act performed by the receiver after the filing of the petition.

(c) The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re Jack Stolkin, Inc.*, 42 Fed. (2d) 829 (C. C. A., 2nd, 1930). The Circuit Court of Appeals for the Third Circuit and the District Court, as well as the Circuit Court of Appeals for the Ninth Circuit in *Moore* vs. *Scott*, 55 Fed. (2nd) 863, misapprehended the effect of the decisions of this Court in *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645; *Straton* v. *New*, 283 U. S. 318, 75 L. Ed. 1060, and *Lion Bonding Co.* v. *Karatz*, 262 U. S. 640, 67 L. Ed. 1151, and failed to give due weight to the decisions of this Court in *In re Watts*, 190 U. S. 1, 47 L. Ed. 933; *Galbraith* v. *Vallely*, 256 U. S. 46, 65 L. Ed. 823; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413, which latter line of cases the New Jersey Court of Chancery has followed.

## IV.

### Statement of the Case.

On September 3, 1931, a bill was filed in the Court of Chancery of New Jersey against Crosby Stores, Inc., a New Jersey corporation, praying for an injunction against defendant corporation and the appointment of receivers pursuant to the Corporation Act of New Jersey, section 65, 2 C. S. of N. J., p. 1640, as amended P. L. 1931, chapter 221, p. 545, sec. 66, 2 C. S. of N. J., p. 1643; on October 13, 1931, the court granted the statutory injunction and appointed petitioners J. S. S. Weisman and John Milton as receivers, as a result of which title to all of the corporation's property passed by virtue of the statute to the receivers, sec. 68, 2 C. S. of N. J., p. 1644, *Nottebaum* v. *Leckie,* 31 Fed. (2d) 556 (C. C. A. 3rd); on October 14, 1931, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York against Crosby Stores, Inc., and the Irving Trust Company was appointed receiver in bankruptcy; no ancillary proceedings were instituted in New Jersey; Crosby Stores, Inc., was adjudged a bankrupt by the United States District Court for the Southern District of New York on October 30, 1931; on December 1, 1931, Irving Trust Company was made trustee in bankruptcy; immediately upon the appointment of the receivers in Chancery they entered into possession of the corporation's property and, under orders of the Court of Chancery, continued the business, which was that of operating department stores (Schedule "G," annexed to the trustee's petition, p. 29); in the conduct of the business the receivers purchased and sold mer-

chandise, incurring obligations, paying in part therefor, and, at the time of the appointment of the trustee in bankruptcy, they had in hand $15,628, to the credit of the Jersey City store and $3,161.77 to the credit of the Perth Amboy store and were indebted to receivers' creditors for merchandise purchased in the operation of the Jersey City store in the sum of $8,832.83 and for consigned merchandise sold at such store $2,382.12 and for operating expenses $683.62, and for merchandise purchased by them in the operation of the Perth Amboy store in the sum of $3,092.58 and for consigned merchandise sold at such store $594.40, and for operating expenses $512.85 (Schedule "H," annexed to the trustee's petition, p. 36; Schedule "G," annexed to the trustee's petition, p. 29).

It is impossible to allocate the moneys in the hands of the receivers, at the time they ceased to operate the business on December 17, 1931, between proceeds of the liquidation of inventory of which they took possession at the time they were appointed and proceeds of the sale of merchandise purchased by them during the time the business was conducted by them. From the date of the appointment of Irving Trust Company as receiver in bankruptcy on October 14, 1931 until December 11, 1931, the receiver and the trustee in bankruptcy acquiesced in the conduct of the business by the receivers in Chancery. On December 11, 1931 the trustee in bankruptcy presented its petition to the referee in bankruptcy in New York which resulted in an order to show cause made by the referee on the same date which, in turn, resulted in the making of the order of December 14, 1931, by the Referee, the receivers in Chancery not appearing on the return of the order to show cause, directing the receivers in Chancery to turn over to the Irving Trust Company all of the property under their con-

trol as receivers in Chancery and to file their account with the Referee (Schedule "B," annexed to the petition, p. 12). This order of the referee in bankruptcy was designed to make effective a sale which the trustee in bankruptcy had made on December 1, 1931, of all of the assets of the bankrupt (pars. 5, 6, 7, petition of trustee, p. 2).

On December 9, 1931 the receivers in Chancery filed their report and account with the Court of Chancery (Schedule "G," annexed to the petition of the trustee, p. 29) which resulted in an order made on that day directed to all the creditors and stockholders and the trustee in bankruptcy requiring them to show cause why the account and report of the receivers should not be approved and proper compensation made (Schedule "C," annexed to the petition of the trustee, p. 14); the trustee, instead of appearing in the Court of Chancery, met the application by the order of the Referee of December 14, 1931 (Schedule "B," annexed to the petition of the trustee, p. 12); on December 14, 1931 the Court of Chancery, disregarding the order of the Referee, made an order approving the receivers' accounts and directing the payment to the receivers of $6,000 for services, to the solicitors of the receivers $4,000 for services besides costs, and to the solicitors of the complainant $350 besides costs (Schedule "D," annexed to the petition of the trustee, p. 16); the trustee in bankruptcy did not appear upon the hearing in the Court of Chancery; instead it instituted its first proceeding af an ancillary nature in the United States District Court for the District of New Jersey by filing a petition, on December 16, 1931 (Schedule "F-1," annexed to the petition of the trustee, p. 21), which resulted in the order of the United States District Court of the same date directed to the receivers and their

solicitors and the solicitors of the complainant in Chancery to show cause before the United States District Court why they should not be directed to turn the assets over to the trustee in bankruptcy and to file their accounts with, and make application for allowances to, the Referee in New York; the receivers in Chancery disregarded this order and, on December 22, 1931, the United States District Court (Schedule "F," p. 26) made an order directing the receivers in Chancery to turn over to the trustee all of the assets under their control "excepting such moneys as they shall have necessarily expended in and about the preservation of the assets and property of said bankrupt prior to the date of the filing of the involuntary petition in bankruptcy against said bankrupt" (one day) and also restraining them from "in any manner disposing of any and all moneys heretofore received by them and/or any of them pursuant to an order made by said Court of Chancery bearing date the 14th day of December, 1931, wherein they were awarded compensation for services alleged to have been rendered by them or any of them referred to in said order"; the receivers in Chancery, after liquidating all their indebtedness, turned over the balance in their hands to the trustee in bankruptcy but refused to turn over the moneys which they had received for compensation under the orders of the Court of Chancery; they filed a further account with the Court of Chancery (Schedule "H," annexed to the petition of the trustee, p. 36), which resulted in an opinion of Vice Chancellor Fallon, 109 N. J. Eq. 450, and in the filing of the petition of the trustee on July 1, 1932 (p. 1), which resulted in the order appealed from (p. 44).

## V.

### Specifications of Error.

1. The United States Circuit Court of Appeals erred in holding that it had jurisdiction in bankruptcy in a summary proceeding to direct the receivers in Chancery, counsel for the receivers and counsel for the complainant, to turn over to the trustee of the bankrupt estate amounts representing fees and costs which had been allowed to them for compensation for services rendered and monies expended in the proceedings in the Court of Chancery which had resulted in the appointment of receivers under the statute of New Jersey and the partial administration of the estate under the directions of the Court of Chancery.

2. The United States Circuit Court of Appeals erred in not holding that the Court of Chancery, which had originally acquired jurisdiction, was competent to hear and determine all questions with respect to the administration of the estate while in the control of the Court of Chancery, through its receivers, and to wind up their accounts, to fix their fees and the fees of their counsel and the solicitor of the complainant and erred in holding that the mere filing of the petition in bankruptcy superseded all jurisdiction of the Court of Chancery.

## Argument.

**1. The decision below is in conflict with the established State law and the decisions of this court and lower Federal courts.**

**2. The decision below unduly interferes with the right of the State court to wind up the affairs of estates which have come to its possession so that its receivers and their counsel may be compensated and what remains turned over to a trustee in bankruptcy.**

**3. The decision below destroys the independence of the State courts in violation of State rights.**

**4. The decision below was erroneous in that it held that the District Court might proceed summarily against the receivers, receivers' counsel and the solicitors of the complainant in the State Court, they being adverse claimants.**

The District Court concluded, and its conclusion was sustained by the Circuit Court of Appeals, that, as soon as the adjudication in bankruptcy, title to the bankrupt's estate vested in the trustee as of the date of the filing of the petition and the jurisdiction of the Court of Chancery of New Jersey was superseded as of the date of filing the petition and that court had no power to wind up the affairs of the estate which had come to it at a time when it had complete jurisdiction, compensate its receivers and their counsel and the solicitor of the complainant and direct the receivers to turn over what might remain to the trustee in bankruptcy. The Circuit Court of Appeals further held that the District Court had power to proceed against the receivers, receivers' counsel and solicitors for the complainant, in a sum-

mary proceeding in bankruptcy notwithstanding that they were adverse claimants of the funds in their possession which had been paid to them by order of the State court and that the officers of the State court had what were in the nature of liens upon the assets of the trust estate in their charge. *Seidler* v. *Branford Restaurant,* 97 N. J. Eq. 153, affd. 97 N. J. Eq. 531; *Jeffers* v. *N. J. and P. R. Co.,* 86 N. J. Eq. 68; *Chesapeake & Ohio R. R. Co.* v. *Atlantic Transportation Co.,* 62 N. J. Eq. 751; *Petersburg Sav. & Ins. Co.* v. *Dellatorre,* 70 Fed. 643 (C. C. A. 5th).

While it is true that an adjudication in bankruptcy places the bankrupt's assets in *custodia legis,* for certain purposes, as of the date of the filing of the petition, it does not follow that the prior actual possession and jurisdiction of a State court is superseded for all purposes. The orderly conduct of administration between successive jurisdictions requires at least that the court having prior jurisdiction be permitted to wind up the proceedings before it, to compensate its officers, and to discharge their obligations.

A contrary view will result in chaos. A receiver appointed by a State court may, under direction of the court, carry on the corporate business, sell property, personal and real, incur obligations upon receiver's certificates and incur other debts. A petition in bankruptcy may be filed shortly before the lapse of the four-month period (and this "four months" period may be changed—Congress might make it a year or any other length of time) and adjudication may follow some time later. Under the decision of the lower courts, it is entirely clear, I submit, that every act of the receiver, after the filing of the petition, is utterly void and this despite the fact that the receiver may be unaware of the filing of the petition. And since it is

unlikely that any court will authorize its receiver to issue certificates, incur debts, or proceed with the administration of the receivership estate if the court has not the power to ultimately provide for the payment of the receiver's certificates and debts and to compensate the receiver and his counsel, the practical effect of the lower courts' decision is to prevent equity or statutory receiverships in State Courts.

The Chancery Receivers upon their appointment gave bond conditioned that they would account in Chancery. How under the circumstances can they comply with the condition of their bond?

The opinion of the District Court in *Silberberg* vs. *Ray Chain Stores*, 54 Fed. (2nd) 650, affirmed 58 Fed. (2nd) 766, certiorari denied, 77 L. Ed. 35, U. S. Supreme Court Advance Opinions, No. 1, October, 1932 Term, p. 35, 53 Sup. Ct. 83, upon which the decision below rests, intimates that acts performed by a State court receiver within four months prior to the filing of a petition in bankruptcy (and the four months might be extended by Congress to any length of time) are at least reviewable by the bankruptcy court, because the appointment of a receiver itself is an act of bankruptcy and void as against the trustee. The adoption of such a view would immediately result in the elimination of all equity or state statutory receiverships.

To preserve their receivership jurisdiction and insure the orderly administration between successive courts, the State courts have reached a conclusion contrary to that reached by the courts below. *Mauran* v. *Crown Carpet Lining Co.*, 23 R. I. 344, 50 Atl. 387 (1901); *Shannon* v. *Shepard Mfg. Co.*, 42 A. B. R. 12, 230 Mass. 224, 119 N. E. 768 (1918); *Perfection Garment Co.* v. *Crosby Stores, Inc.*, 109

N. J. Eq. 450 (Ch. 1932); *Shachat* v. *Standard Auto Supply Co.*, 106 N. J. Eq. 105 (Ch. 1930); *Colton* v. *Bankshares Corporation of the United States*, 108 N. J. Eq. 417 (Ch. 1931); *Kennedy* v. *American Tanning Co.*, 81 N. J. Eq. 109-111 (Ch. 1913); *Cudahy Packing Co.* v. *New Jersey Dairy Products Co.*, 90 N. J. Eq. 541 (Ch. 1919); *Board of Directors of Suburban Construction Co.* (1913), 143 N. Y. Supp. 363 (not officially reported); *Isenberg* vs. *Kimberley Phonograph Co.*, 111 N. J. Eq. 195 (Ch. 1932); Contra: *Bloch* v. *Bloch*, 86 N. Y. Supp. 1047 (not officially reported). Recognizing the existence of the rule is *Taylor* v. *Mason* (Va. Sup. Ct. of Appeals), 164 S. E. 652, 158 Va. 870.

In *Colton* v. *Bankshares Corporation*, 108 N. J. Eq. 417 (1931), Vice Chancellor Backes ably expressed the position of the State court:

> "On May 2d, 1930, Samuel I. Kessler was appointed receiver of the defendant company. On June 6th, on its own petition the company was adjudged a bankrupt by the federal court in New York and on August 14th the Irving Trust Company was appointed trustee. The receiver has filed his account, asks its approval, the fixing of his compensation and that of his counsel and direction to pay the residue to the trustee. On June 15th, 1931, the federal court (a referee) ordered the receiver individually to file his account in that court together with a verified statement of his services and expenses as receiver to the date of the adjudication and that he forthwith turn over the estate in his hands to the trustee. New York counsel of the trustee, who was also the attorney of the petitioner in bankruptcy, appeared on this motion, *pro hac vice*, and, presuming to appear specially objected to the court making allowances, claiming that the jurisdiction resides in the federal court.

A compliance with the order of the federal court by our receiver without the consent of this court would be contempt of this court. A more orderly and courteous procedure would have been to have applied to this court for directions to its receiver; and, according to the authorities, that is the exclusive course. The course adopted by counsel for the trustee is unwarranted and his statement in court that a non-compliance with the order of the referee might result in our receiver landing in jail is offensive. The federal court may well be depended upon to restrain such threatened abuse of power. The practice as laid down in Shachat *v.* Standard Auto Supply Co., 106 N. J. Eq. 105, is that indicated *In re* Watts & Sachs, 190 U. S. 1, which has ever since been the guide of courts and lawyers in this state, that the court of primary jurisdiction may supervise the administration of its receivers and fix their compensation, and it will be adhered to. The recent case of Isaacs *v.* Hobbs Tie & Timber Co., 282 U. S. 734, cited by the trustee, does not touch that question. That was a foreclosure of mortgage suit brought after a trustee was appointed and the court held it to be not maintainable; that as the mortgaged property was in the hands of the bankruptcy court, the right to a lien and its enforcement could only be handled in that court. The opinion deals with the title to bankrupt's property and not with the orderly judicial administration of bankrupt's assets, and restates the familiar rule that obtains in all courts of equity and upholds the authority of this court as the court of original jurisdiction to dispose of property in its custody according to law: "* * * when a court of competent jurisdiction takes possession of property through its officers this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction may not disturb

that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property.' This is a plain recognition of the power of this court to control the disposition of property in *custodia legis* and that right must be accorded by the bankruptcy court until this court has set its house in order. The principles of comity in judicial conduct are informatively discussed by Mr. Justice Moody in Wabash Railroad Co. *v.* Adelbert College, 208 U. S. 38. The duty of this court under our corporation act was to administer the estate while in its possession and its duty now is to pass the assets over to the federal court, whose jurisdiction has superseded ours under the Bankruptcy Act, after liquidating the expenses attending its administration in this court. This makes for convenient and orderly conduct of administration between successive jurisdictions, and is supported by the weight of authority and has been followed by both state and federal courts as the appropriate course since *In re* Watts & Sachs."

In *Kennedy* v. *American Tanning Co.*, 81 N. J. Eq. 109 (1913), Vice Chancellor Garrison said (p. 111):

"Without going deeply into the matter, I cannot conceive it possible that the bankruptcy court would contend that it was entitled to take over the property which had been in *custodia legis* in this court until this court should have reimbursed those who had, under its direction or with its sanction expended moneys for the preservation of the property in question. Very different questions arise where moneys are to be paid out for any other purposes, and I shall not herein discuss those other questions."

This Court and lower Federal courts have, on many occasions, recognized the propriety of the view of the State courts in decisions which are in conflict with the decision of the courts below in the case at bar. In *In re Watts*, 190 U. S. 1, 35, 47 L. Ed. 933, 944 (1903), Chief Justice Fuller, speaking for this Court, said:

> "It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's estate in the state court, but it remained for the state court to transfer the assets settle the accounts of its receiver and close its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way."

In *Carling* v. *Seymour Lumber Co.*, 113 Fed. 483, 491 (C. C. A., 5th, 1902), certiorari denied 186 U. S. 483, 46 L. Ed. 1261, citing approvingly *Mauran* v. *Crown Carpet Lining Co.*, 23 R. I. 324, 50 Atl. 331, and in *Brown* v. *Crawford*, 254 Fed. 146 (District Court of Oregon, 1918) and in *Ohio Motor Car Co.* v. *Eiseman Magneto Co.* (C. C. A., 6th, 1916), 230 Fed. 370, at 376, it was held that the bankruptcy court ought not to make a peremptory order on a State receiver directing him to turn over assets to the receiver or trustee in bankruptcy and that application should be made, in the first instance, by the receiver or trustee in bankruptcy to the State court and Justice Sanford, six months later Justice of this Court, when District Judge for the Eastern District of Tennessee, in *Re Dayton Coal & Iron Co.*, 291 Fed. 390 (1922), so carefully considered the cases which had been decided up to that time and so anticipated the confusion and unseemly conflict which would arise upon the promulgation of such a rule as the Courts below in the case

at bar have adopted as that I quote from the opinion somewhat *in extenso* (p. 399):

> "In the light of the foregoing cases, I conclude that the prior jurisdiction acquired by a State court in a winding up proceeding, is not *ipso facto* superseded or suspended by the filing of a petition in bankruptcy, but that, as the State court cannot take judicial notice of the bankruptcy proceeding and is under the duty of proceeding in the case before it until informed of the changed relations of the defendant, it retains its jurisdiction in the winding up proceedings, under the rule of comity, until the pendency of the bankruptcy proceedings is brought to its notice and a request made to it by the bankruptcy court or a duly authorized officer thereof, for the delivery of possession of the property of the defendant. A contrary holding would, in my opinion, be not only in conflict with the foregoing authorities and the rule of comity, but against a sound public policy. It would certainly lead to most disastrous results, to the wasting of the assets in fruitless litigation, and to great confusion, if, after the filing of the petition in bankruptcy the hand of the State court is to be deemed as stayed by the mere operation of law, so that when, without notice of the bankruptcy petition or any request of the bankruptcy court for the surrender of the assets, the State court proceeds in the due administration of the estate entrusted to its charge, adjudicating the rights of parties, selling and disposing of assets, and subsequently after an interval of months, or in case of contest and appeals, perhaps of years, an adjudication in bankruptcy is made, its jurisdiction is to be deemed to have been terminated as matter of law, upon the filing of the petition and all its subsequent proceedings rendered thereby void. And this is

> especially the case where the bankruptcy court has not only failed to request the delivery of the property, but, on the contrary, as in this case, affirmatively declined to appoint a receiver to take charge thereof. So far as I am aware, this has never been held or even suggested in any previous case. And I find nothing contrary to the view herein expressed in the holding in *Re* Diamond's Estate (6th Cir.), 259 Fed. 70, 170 C. C. A. 138. There the receiver of the bankruptcy court had been directed to apply to the State court for the surrender of all the debtor's assets, and the State court had, upon such application, directed its receiver so to do. Thereafter an adjudication in bankruptcy having been made, and the State receiver declining to turn over all the assets to the bankruptcy receiver, as he had been ordered by the State Court to do, it was held that the bankruptcy court might summarily compel him to surrender such assets. There, of course, the State court had received actual notice of the pendency of the bankruptcy proceedings, the rule of comity had been fully complied with, and the recalcitrant receiver was then no longer holding the assets for the State court, but in disobedience of its specific order. See Galbraith *v.* Vallely, 256 U. S. 46, 41 Sup. Ct. 415, 65 L. Ed. 823."

The learned Judge distinguishes *In re Diamond's Estate,* 259 Fed. 70, decided in 1919, with respect to which the Circuit Court of Appeals for the 2d Circuit in *In re Jack Stolkin, Inc.,* 42 Fed. (2d) 829, in 1930 said that it had been decided before the decision of this Court in *Galbraith* v. *Vallely,* 256 U. S. 46, 65 L. Ed. 823.

There is no doubt, if the opinions in *Silberberg* vs. *Ray Chain Stores,* 54 Fed. (2d) 650, affirmed 58 Fed. (2d) 766, followed in the case at bar, state the law, but that any act

performed by a State or Federal Court of equity in receivership proceedings after the filing of a petition in bankruptcy, and whether the State or Federal Court of equity had knowledge of the filing or no, is void. This means that, immediately upon the filing of a petition in bankruptcy, even if the State or Federal Court of equity has no knowledge of it, the State or Federal Court of equity loses jurisdiction, the filing of a petition being a caveat against the world. If the State or Federal Court of equity has knowledge of the filing of the petition, no matter what the emergency, it must immediately cease its administration—and what is its receiver to do? If it has no knowledge of the filing of the petition and it and its receiver proceed with the administration of the estate, being without jurisdiction, its acts, and the acts of its receiver, are void and those who deal with it or its receiver, however *bona fide*, acquire no rights whatever. The property of a corporation might be in the hands of a receiver appointed by a State or Federal Court of equity in New Jersey. The corporation might have a business place in San Francisco. A petition in bankruptcy might be there filed. No notice of it might be acquired by the Court in New Jersey for months and yet every act of the Court in New Jersey and of its receiver, after the filing of the petition, would be void. Its receiver, for acts performed by him under its directions, would be obliged to cross the continent to have his conduct passed upon and allowances made to him for any services which the Court of Bankruptcy in San Francisco might deem were worthy of compensation, assuming now, which is questionable, that, under the bankruptcy act, the Court of Bankruptcy has any power to make any such allowance. Creditors of the receiver, becoming such upon the faith of the

orders of the Court in New Jersey, including purchasers of receiver's certificates, would be obliged, if they desired to protect such rights as they might have as a result of void acts—for receiver's certificates may have been authorized by the Court in New Jersey after the filing of the petition in bankruptcy without knowledge thereof—to travel to the place in which the Court of Bankruptcy would be sitting and depend upon that Court for such protection as it might be able, under the law, to afford.

There is no express provision of the Bankruptcy Act permitting a Court of Bankruptcy to compensate State receivers or to provide for the protection of creditors of State or Federal equity or statutory receivers and the absence of such express provisions is, I submit, an indication that Congress never intended that such a situation as would be created, if the opinions below state the law, should ever arise. The effects which may be created by an act of Congress, if certain interpretations are put upon its language, and the effects which may be created by holding that Congress, under the Constitution, has certain powers may be taken into consideration in construing an act or in construing a constitutional grant of power. *First National Bank* v. *Maine,* 284 U. S. 312, 76 L. Ed. 313.

This Court has been consistent in expressing its desire that conflict between State and Federal courts be avoided, and in *Harkin* v. *Brundage,* 276 U. S. 36, 72 L. Ed. 457, it said (at p. 465):

> "In this country, in which in every state we have courts of concurrent jurisdiction under the Federal and state authority, it is of the highest importance that conflict of jurisdiction should be avoided. It can only be avoided by forbearance and comity. * * *"

It is true that the matter involved in that case was one over which the Federal and State Courts had concurrent jurisdiction, but in *Re Watts,* 190 U. S. 1, 47 L. Ed. 933, decided in 1903, Mr. Chief Justice Fuller, delivering the opinion of this Court, while stating that the laws of the United States with respect to bankruptcy were paramount, nevertheless indicated that, under them, the possession by a State court, through its receivers, of property which had lawfully come under the control of the State Court could not be summarily taken from it by the Federal Court.

It was argued below by respondent that Watts did not interpret the language of this Court as giving him the right to apply to the State Court to have his fees fixed because he applied to the Federal Court as indicated in *In re M. Zier & Co.,* 127 Fed. 399, affirmed 142 Fed. 102. Respondent overlooked that, prior to the decision of this Court, the assets of the estate had been delivered to the bankruptcy receiver,—indeed, prior to the case coming to this Court (47 L. Ed. 938, 190 U. S. 16).

The State Court, having parted with possession of the assets would not, of course, entertain jurisdiction to settle fees which it could not order paid. There was nothing for Watts to do except to apply to the Federal Court.

It was argued below that the remarks of Mr. Chief Justice Fuller upon which I rely were obiter. If obiter, they were judicial obiter and were made with deliberation and intent by Mr. Chief Justice Fuller for all of the Justices of this Court, save Mr. Justice Harlan, and with full knowledge that they might, by some, be considered obiter, for the concurring remarks of Mr. Justice Harlan were of such a nature as to indicate to the other members of the Court that he thought that they might have decided the case upon narrower reasoning.

It was suggested below that the language of Mr. Chief Justice Fuller to the effect that it remained "for the State Court to transfer the assets, settle the accounts of its receiver and close its connection with the matter" does not imply that he meant that the State Court might compensate its officers. If the language does not include the right of the State Court to compensate its officers, neither does it include the right of the State Court to make provision, out of the assets, for the payment of the debts of the receiver incurred upon the faith of the State Court's orders. How can a Court settle the accounts of its receiver and close its connection with the matter without compensating its officers and without providing for the payment of debts incurred under its authority?

The settlement of accounts includes all of these matters for the accounts of the receiver cannot be settled, nor can the State Court's connection with the matter be closed, without considering them. Debts which may be created under the orders of the State Court are not, technically, debts of the State Court—but, nevertheless, they are debts incurred under the authority of the State Court, and in conscience, are the debts of the State Court, and, if the rule establishel by the opinions below be given effect, the State Court in effect becomes a suppliant at the bar of the Federal Court before the referee in bankruptcy. Did Congress intend this?

The Watts case has been relied upon by the State Courts and by many of the lower Federal courts, and unless it establishes the rule in a case where there is a State proceeding, which is superseded by a bankruptcy proceeding, there is no authoritative decision of this Court, although there are decisions in analagous cases which, I submit, support the position of petitioners here.

*Lion Bonding Co.* v. *Karatz,* 262 U. S. 640, 67 L. Ed. 1151, at page 1152, was relied upon by respondent below. The opinion in that case was delivered upon a motion to modify a decree entered as a result of the opinion in *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 67 L. Ed. 871. A reference to the facts stated in that opinion will indicate that the case was not concerned in any manner with bankruptcy, with the result that the statement in the opinion relied upon below was obiter.

*Stellwagen* v. *Clum,* 245 U. S. 605, 62 L. Ed. 507, decided in 1918, opinion by Mr. Justice Day, was relied upon by respondent below. What this Court was considering in that case was whether the State statute there under consideration was suspended by the existence of the Federal bankruptcy act under the doctrine of *Sturges* v. *Crowninshield,* 4 Wheat. 122, 4 L. Ed. 529; *Ogden* v. *Saunders,* 12 Wheat. 213, 6 L. Ed. 606. Mr. Justice Day cited the Watts case, 190 U. S. 1, 47 L. Ed. 933, 943, as one of the authorities for the proposition that "the bankruptcy proceedings, taken within four months, displace those in the State court and terminate the jurisdiction of the latter." What was meant by this remark of Mr. Justice Day depends upon what meaning is to be ascribed to the words "terminate the jurisdiction." If the Watts case is examined it becomes apparent, I submit, that the language only means that, with respect to the subsequent administration of the estate for the benefit of creditors, the Federal Court steps in. It cannot mean that the State Court immediately loses all jurisdiction, for the opinion in the Watts case expressly indicates that the State Court retains jurisdiction to transfer the assets, settle the accounts of the receiver and close its connection with the matter, and this Court declined to concur in the argument of

the bankruptcy receiver to the effect that the State Court, having no jurisdiction whatever after the filing of the petition in bankruptcy, had no power to hear and determine the question of whether or not it would relinquish the property and that it became its duty to do so at once, upon being informed of the proceedings in the United States Court, and that every step taken thereafter with reference to the property and its custody was *coram non judice.*

I will next consider decisions of this Court involving the rights of assignees for the benefit of creditors which are stated to be analogous to the rights of receivers. I submit that the rights of a receiver appointed under the New Jersey statute concerning corporations are higher than the rights of an assignee under a general assignment but, however that may be, if an assignee, acting under a State statute, has the right to hold adversely to a receiver or trustee in bankruptcy the property in his possession as security for the payment of his fees and expenses, then, *a fortiori,* a receiver appointed under the New Jersey statute has the same right. So far as I know, no statute of any other State provides that, upon the appointment of a receiver, not only the right to possession but title vests in the receiver.

The three cases in this Court with respect to the rights of assignees under general assignments are: *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 46 L. Ed. 413 (1902); *Galbraith* v. *Vallely,* 256 U. S. 46, 65 L. Ed. 823 (1921); *May* v. *Henderson,* 268 U. S. 108, 69 L. Ed. 870 (1925).

In connection therewith there is to be considered *In re Jack Stolkin, Inc.,* 42 Fed. (2nd) 829, decided by the Circuit Court of Appeals for the Second Circuit (1930).

*Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413, and *Galbraith* v. *Vallely*, 256 U. S. 46, 65 L. Ed. 823, were disposed of below by respondent by the assertion that, in each case, the assignee had been paid the moneys involved for his fees prior to the filing of the petition in bankruptcy, and *In re Jack Stolkin, Inc.*, 42 Fed. (2nd) 829, in the same manner.

In *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413, Comingor had been acting as an assignee under a State statute. He had filed his accounts in the State Court. He had been enjoined by the Bankruptcy Court from proceeding with his accounting. The Bankruptcy Court entertained a summary proceeding against him to compel him to turn over the amounts of moneys which he had paid counsel and which he had himself retained. It is obvious that he could not have retained money prior to the proceedings in bankruptcy, for he was still acting as assignee up to that time. There could be no retention until the proceeding in bankruptcy had been commenced. This Court, in the course of its opinion, 184 U. S. 18, 46 L. Ed. 413, a page 416, said:

> " 'We think that it could not have been the intention of Congress thus to deprive parties claiming property of which they were in possession of the usual processes of the law in defense of their rights.' Marshall *v.* Knox, 16 Wall. 556, 21 L. Ed. 484; Smith *v.* Mason, 14 Wall. 419, 20 L. Ed. 748."

It then said (p. 416):

> "He, (the assignee) had been restrained from settling his accounts in the state court in the action pending there, and the district court, instead of dissolving the injunction declining jurisdiction, and leaving the litigation to the state court, either in due

course or by plenary suit, adjudicated the merits and entered a peremptory order that he should pay over, disobedience of which order was punishable by commitment. We think that in this there was error, and that the circuit court of appeals was right in its decree of reversal."

*Galbraith* v. *Vallely*, 256 U. S. 45, 65 L. Ed. 823, is found below in *In re Reiswig*, 253 Fed. 390. The Court below attempted to distinguish the Comingor case. It recognized that there was no difference in the application of the law as to whether the payments had been made before or after the proceeding in bankruptcy had been commenced, and in the course of its opinion said, (p. 398):

> "Such being the real decision in the Comingor case, it is not an authority for the doctrine that a court of bankruptcy has no jurisdiction to cite a common-law assignee to account for moneys which have come into his hands under the assignment, but is only an authority against the abuse of the jurisdiction. The assignee, as to all moneys which come into his hands under the assignment, is the agent of the bankrupt (not so as to a receiver appointed under the New Jersey Corporation Act), and the fact that he claims a certain part of the fund for fees and expenses, does not make him any more an adverse claimant as to those sums than the same claim would be for the residue of the estate. The assignee cannot by his mere say-so cause himself to cease to hold a part of the estate as the agent of the bankrupt, and convert himself into an adverse claimant. If, while acting in good faith as assignee, he had actually disbursed the moneys which he claims as fees and expenses, he cannot be committed to jail for failure to turn them over." * * * (Page 390): "On February 4, 1918, respondent, Galbraith,

> filed with the referee in bankruptcy his report and account as assignee, which showed receipts as above, and set forth a detailed statement of disbursements, amounting to $1,631.53. * * * The residue, to wit, $1,631.53 Galbraith retained as legitimate disbursements and fees under the common law assignment." * * * (399): The assignee here, when cited to show cause, had not parted with the funds in any real sense."

It attempted to distinguish the Comingor case by holding that all that this Court had held was that, if it appeared, upon the hearing on an order to show cause, that the assignee did not have funds in his possession at that time to respond to a summary order, he could not be summarily proceeded against by an order which would have the effect of placing him in jail.

The District Court was affirmed by the Circuit Court of Appeals for the 8th Circuit, in *Galbraith* v. *Vallely*, 261 Fed. 670, and the opinion of that Court is important for the reason that it indicates the views of the lower Courts which were before this Court and with which this Court could not agree. It is significant that the Circuit Court of Appeals relied upon *Randolph* v. *Scruggs*, 190 U. S. 533, 47 L. Ed. 1165; *Stellwagen* v. *Clum*, 245 U. S. 605, 62 L. Ed. 507, both of which were relied upon by respondent below.

When the case came to this Court, 256 U. S. 46, 65 L. Ed. 823, this Court did not question the facts as stated by the lower courts and I submit that it appears that, at least with respect to the money retained, this Court treated it, as had the courts below, as having been in the possession of the assignee after the proceeding in bankruptcy had been commenced and segregated thereafter, else the word "re-

tained" would not have been used. This Court said (256 U. S. 46, 65 L. Ed., at p. 824):

> "We think the referee was right in holding that the case was governed by Louisville Trust Co. *v.* Comingor, *supra.* * * *
>
> It may be, as suggested by the circuit court of appeals, that a summary proceeding at the instance of the trustee would afford a more speedy and economical administration of the estate in bankruptcy. But the right to recover in such instances only in suits of the ordinary character, with the rights and remedies incident thereto, has been consistently maintained by this court. The principle of the Comingor case has never been departed from in this court. It establishes the right of an assignee for the benefit of creditors, to the extent that he asserts rights to expenses incurred and compensation earned under an assignment in good faith, before the bankruptcy proceedings, to have the merits of his claim determined in a judicial proceeding suitable to that purpose, and not by summary proceedings where punishment for contempt is the means of enforcing the order. We see no occasion to depart from this practice. There was no waiver by the assignee of his rights in this respect. He made no attempt to retain the body of the estate as against the trustee in bankruptcy. As to his disbursements and compensation while acting as assignee, he asserted an adverse claim. Under the settled rule of this court he could not be proceeded against summarily for such disbursements and compensation over his protest, duly made, against that method of procedure."

It is true that this Court said (p. 824):

> "Without waiving objection, and subject to the right of Galbraith to assert his objection to the pro-

> ceedings, testimony was taken concerning the money expended and retained by the assignee prior to the bankruptcy proceedings, for administering the estate."

But I submit that a consideration of the opinions of the lower Courts will indicate that this Court did not mean that the money had been retained by the assignee prior to the bankruptcy proceedings, but rather that it represented compensation for services rendered prior to the bankruptcy proceedings.

The opinion of this Court construes its former opinion in *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 46 L. Ed. 413, and distinguishes and limits its decision in *Randolph* v. *Scruggs,* 190 U. S. 533, 47 L. Ed. 1165, upon the latter of which great reliance was placed by respondent below.

These cases were all considered by the Circuit Court of Appeals for the 2nd Circuit in 1930 in *In re Jack Stolkin, Inc.,* 42 Fed. (2nd) 829. In that case there can be no question but that items involved represented payments made after the filing of the petition in bankruptcy.

In construing the law as determined by this Court in cases later than *Bryan* v. *Bernheimer,* 181 U. S., at page 192, 45 L. Ed. 814, relied upon by respondent below, the Circuit Court of Appeals said (42 Fed. (2d) 830):

> "But the Supreme Court, while adhering to the rule that the bankruptcy court may summarily order the assignee to turn over property in his hands or under his control which formerly belonged to the bankrupt in so far as it is not fairly required to pay obligations which he incurred before the petition was filed, or to compensate him for his services, has

> treated him as an adverse claimant in respect to such items."

After considering *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413, and *Galbraith* v. *Vallely*, 256 U. S. 46, 65 L. Ed. 823, the Circuit Court of Appeals for the 2nd Circuit, said (42 Fed. (2nd) 831):

> "Thus it seems to have been steadily held that the claims of an assignee for compensation or indemnity for expenses in matters antedating the filing of a petition in bankruptcy so far as they are not colorable cannot be disposed of in a summary proceeding. The amount which may be allowed depends upon the benefit which has been afforded to the bankruptcy estate (Randolph *v.* Scruggs, 190 U. S. at p. 538, 23 S. Ct. 710, 47 L. Ed. 1165) but it must be determined in a plenary action if the assignee stands on his rights in this respect."

It considered the effect of *May* v. *Henderson*, 268 U. S. 111, 69 L. Ed. 870, relied upon by respondent below, in the following language (42 Fed. (2nd) 831):

> "In May *v.* Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870, the Supreme Court held that assignees were properly directed to turn over assets of a bankrupt estate to the trustee in a summary proceeding. But Justice Stone, who wrote the opinion, at page 119 of 268 U. S., 45 S. Ct. 456, 460, distinctly recognized Louisville Trust Co. *v.* Comingor and Galbraith *v.* Vallely as binding authorities and only rejected the assignee's contention that he was an adverse claimant because the claim there was 'merely colorable and on its face made in bad faith and without any legal justification'."

It declined to follow *In re Neuberger,* 233 Fed. 701, affirmed 240 Fed. 947 and *In re Diamond's Estate,* 259 Fed. 70, upon the ground that they had been decided before *Galbraith* v. *Vallely,* and that each, like *In re Reiswig,* reversed in the Galbraith case, sought to distinguish *Louisville Trust Co.* v. *Comingor* upon a basis subsequently rejected by this Court in the Galbraith case.

The fact is that what the Circuit Court of Appeals said in *In re Diamond's Estate,* 259 Fed. 70, upon the subject of the power of the Federal court in bankruptcy to require State receivers to turn over all of the assets without permitting the State court to make provision for the compensation of the receivers was obiter for, prior to the decision, the State court had yielded and had directed its receiver to pay the money to the bankruptcy receiver (259 Fed. 72) as was pointed out by Judge Sanborn in *In re Dayton Coal & Iron Co.,* 291 Fed. 390 (p. 17 of this brief).

*In re Zier & Co.,* Circuit Court of Appeals for the 7th Circuit, 142 Fed. 102, which was the outgrowth of the Watts case, is not authority because, prior to the decision of this Court in the Watts case, the State court had yielded and the assets had been turned over to the trustee in bankruptcy.

*Hume* v. *Myers,* 242 Fed. 827, Circuit Court of Appeals for the 4th Circuit, (1917), relied upon by the Circuit Court of Appeals for the 6th Circuit in *In re Diamond's Estate,* 259 Fed. 70, is not in point. In that case there had been an equity receivership in the Federal court. Subsequently, there were bankruptcy proceedings. The receivers in equity "turned over the entire property to the trustee in bankruptcy and thereafter filed their petition in the court of bankruptcy alleging the order of the district court for the eastern district (an order which purported to allow re-

ceivers' and counsel fees, but without charging the property directed to be turned over with their payment) to be an adjudication of their claims binding on the bankruptcy court, conferring on them a right to have the allowances to them and their counsel paid in preference to the lien creditors". The question before the Circuit Court of Appeals was stated by that Court, 242 Fed. at page 829, in the following language:

> "Stripped of mere incidental facts, the case made by the appeal is this: A court of equity appoints receivers of a corporation on the ground of insolvency, at the instance of a stockholder owning nearly all the stock, in a proceeding to which no creditor, secured or unsecured, was made a party by service. While the property is undisposed of in the hands of the receivers, the corporation is adjudicated a bankrupt. The court of equity then orders its receivers to turn over the corporate property to the trustee in bankruptcy, and by the same order fixes the compensation of the receivers and their counsel, without making provision for its payment. Is the order of the court of equity, making the allowances, binding as res adjudicata on the court of bankruptcy?"

There was not presented the matter of a refusal of State court receivers to turn over property to the bankruptcy court until their compensation had been paid or provided for. The Court used language which indicated that it considered that there is a distinction between cases in which the assets have been turned over and cases in which they have not been, for it said (242 Fed. 830):

> "There is a distinction between the effect of the order before us and an order of a court of equity making such allowance, where the property has,

through the instrumentality of the receivers, been disposed of, and the purchase money is in the hands of the receivers. In the latter situation there is reason in the view, though we do not commit ourselves to it, that the court of equity turns over only the net fund in its hands after deducting the expenses incurred in its production, including the compensation of its receivers and their counsel. It is true that in many of the cases broad language is used in favor of the authority of courts to fix the compensation of their officers; but these cases related to allowances and payment from funds in hand, not to fixing charges upon specific property to be turned over to the bankruptcy court. Kennedy v. American Tanning Co., 81 N. J. Eq. 109, 85 Atl. 812; Singer v. National Bedstead Mfg. Co., 65 N. J. Eq. 290, 55 Atl. 868; State v. German Exchange Bank, 114 Wis. 436, 90 N. W. 570; In re Board of Directors Suburban Co., 143 N. Y. Supp. 363; Mauran v. Crown Carpet Lining Co., 23 R. I. 344, 50 Atl. 387; Id., 23 R. I. 324, 50 Atl. 331; Wilson v. Parr, 115 Ga. 629, 42 S. E. 5. The distinction is forcibly stated in Hanson v. Stephens, 116 Ga. 722, 42 S. E. 1028. When the court of equity has not reduced the property to money, it is not in possession of that definite knowledge of the value of the property which is an important factor in finally fixing compensation."

What the Court held was that, after the property had been turned over to the trustee in bankruptcy, any order made by the court of equity could not be considered as *res adjudicata* in the court of bankruptcy, but that the court "by comity will indulge the presumption in favor of the correctness of the allowance."

It referred to the Watts case, 190 U. S. 1, 47 L. Ed. 933, and it considered that the language of this Court to the

effect that it remained "for the state court to transfer the assets, settle the accounts of its receiver and close its connection with the matter errors, if any, committed in so doing could be rectified in due course and in the designated way," meant "rectification by the bankruptcy court, for, after the assets are turned over to that court, all orders relating to the matter must emanate from that court." Mr. Chief Justice Fuller, I submit, in the Watts case did not mean that, if the State court retained jurisdiction to settle the accounts of its receivers, the bankruptcy court, by direct action upon the State court, could cure any errors. The "designated way" referred to was, I submit, by appeal to the appropriate State appellate court, with ultimate resort to this Court. It is clearly, I submit, indicated by both *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 46 L. Ed. 413, and *Galbraith* v. *Vallely,* 256 U. S. 46, 65 L. Ed. 823, that, where the bankruptcy court cannot entertain summary jurisdiction, the proper court of appeal is the State appellate court, for no other procedure would be orderly.

I now consider *Isaacs* v. *Hobbs Tie & Timber Company,* 282 U. S. 734, 75 L. Ed. 645, and *Straton* v. *New,* 283 U. S. 318, 75 L. Ed. 1060, the first decided Feb. 24, 1931, and the latter April 20, 1931, as a result of which the Courts below in *Silberberg* vs. *Ray Chain Stores,* 54 Fed. (2nd) 650, followed in the case at bar, conceived themselves bound to overturn the established practice, so far at least as the District of New Jersey is concerned. Neither case involved the situation now before this Court or a situation analogous thereto. The cases heretofore mentioned were not cited. The principle established by *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 46 L. Ed. 413, and *Galbraith* v. *Vallely,* 256 U. S. 46, 65 L. Ed. 823, was not considered.

In *Straton* v. *New*, 283 U. S. 318, 75 L. Ed. 1060, Mr. Justice Roberts, speaking for this Court, refers to *In re Watts*, 190 U. S. 1, 47 L. Ed. 933, with approval. The observations of Mr. Chief Justice Fuller in the Watts case with respect to the paramountcy of the bankruptcy law had been relied upon below as authority for the statement that the Bankruptcy Court would not permit the prosecution of proceedings to enforce a lien in a State Court where the proceedings had been commenced more than four months before the bankruptcy. Mr. Justice Roberts, in 75 L. Ed. at page 1101, adverting to the language of Mr. Chief Justice Fuller, said:

> "The language quoted from that case by appellees respecting the paramount and exclusive jurisdiction of the court of bankruptcy must be read in connection with the facts on which it was predicated."

And so, whatever language was used by this Court in *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645, and *Straton* v. *New*, 283 U. S. 318, 75 L. Ed. 1060, with respect to the "paramount and exclusive jurisdiction of the court of bankruptcy must be read in connection with the facts upon which it was predicated."

*Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645, involved but one question, as stated by Mr. Justice Roberts, speaking for this Court, 75 L. Ed., at p. 655, 282 U. S. 735, as follows:

> "After the bankruptcy court has acquired jurisdiction of the estate of the bankrupt and the referee therein has entered an order requiring sale, by the trustee, of all of the property of the bankrupt but before the trustee has taken any steps to sell land

> (part of such estate) entirely located in another judicial district, can a suit to foreclose a valid mortgage thereon be commenced and an order of sale thereunder be made over the objection of the trustee, by the court of the latter district?"

Obviously the answer had to be "no" and, in making the answer, this Court had no occasion to consider the matter which is now here. The difficulty is occasioned by the language as follows, 75 L. Ed., at p. 661, 282 U. S. 737:

> "Upon adjudication, title to the bankrupt's property vests in the trustee with actual or constructive possession, and is placed in the custody of the bankruptcy court. Mueller v. Nugent, 184 U. S. 1, 14, 46 L. Ed. 405, 411, 22 S. Ct. 269. The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. Robertson v. Howard, 229 U. S. 254, 259, 260, 57 L. Ed. 1174, 1177, 33 S. Ct. 854; T. E. Wells & Co. v. Sharp, 125 C. C. A. 609, 208 Fed. 393; Galbraith v. Robson-Hilliard Grocery Co., 133 C. C. A. 46, 216 Fed. 842, 32 Am. Bankr. Rep. 752. It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate."

and page 664:

> "When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts. White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 20 S. Ct. 1007; Murphy v. John Hofman Co., 211 U. S. 562, 53 L. Ed. 327, 29 S. Ct. 154; Dayton v. Stanard, 241 U. S. 588, 60 L. Ed. 1190; 36 S. Ct. 695."

This Court then adds (p. 665):

> "This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property. Murphy v. John Hofman Co., 211 U. S. 562; 53 L. Ed. 327, 29 S. Ct. 154, supra; Wabash R. Co. v. Adelbert College, 208 U. S. 38, 52 L. Ed. 379, 28 S. Ct. 182; Harkin v. Brundage, 276 U. S. 36, 72 L. Ed. 457, 48 S. Ct. 268. Thus, while valid liens existing at the time of the commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation. Ex Parte City Bank, 3 How. 292, 11 L. Ed. 451; Houston v. City Bank, 6 How. 486, 12 L. Ed. 526; Ray v. Norseworthy, 23 Wall. 128, 23 L. Ed. 116; Re Wilka (D. C.), 131 Fed. 1004, supra; Nisbet v. Federal Title & T. Co., 144 C. C. A. 54, 229 Fed. 644. The exercise of this function necessarily forbids interference with it by foreclosure proceedings in other courts, which save for the bankruptcy proceeding would be competent to that end."

It may be conceded that, upon adjudication, title to the bankrupt's property for certain purposes vests in the trustee as of the date of the filing of the petition, although that remark of this Court in the Isaacs case was *obiter* for it appears that the proceedings in foreclosure in the State court had been commenced after adjudication, and the

bankrupt act, Sec. 70, by its express terms, Title 11, U. S. C. A., Sec. 110, p. 277, provides:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt. * * *"

*Mueller* v. *Nugent*, 184 U. S. 1, 14, 46 L. Ed. 405, is authority only for the proposition that title and the right to possession vests in the trustee as of the date of adjudication. The question there was whether the mere fact that a third party held property of the bankrupt, asserting no interest in himself, prevented a court of bankruptcy taking summary action to compel a turnover to the trustee. Obviously the answer should be "no" for, the title and right of possession having vested in the trustee as of the date of adjudication, there could be no question but that the trustee could summarily take from a third party, who held such propertly solely in trust for the bankrupt and so for the trustee, the trustee having succeeded to the right of the bankrupt, and the determination in that case is no authority for a holding that the title and right of possession of the trustee related back to the date of the filing of the petition for all purposes.

*Mueller* v. *Nugent*, 184 U. S. 1, 14, 46 L. Ed. 405, must be read in connection with what this Court later said in *Louisville Trust Co.* v. *Comingor* and *Galbraith* v. *Vallely*, and also in connection with *In re Watts*, 190 U. S. 1, 47 L. Ed. 933, for Mr. Chief Justice Fuller delivered the opinion in the Watts case as also in the Mueller case.

*Robertson* v. *Howard,* 229 U. S. 254, 259, 260, 57 L. Ed. 1174, 1177, is not, as I read the case, authority for the proposition that title vests in the trustee "as of the date of the filing of the petition in bankruptcy." It is authority that a trustee takes title to property both within and without the district and that was the only point involved.

Neither *Wells & Co.* v. *Sharp* (C. C. A. 8th), 208 Fed. 393, nor *Galbraith* v. *Robson-Hilliard Grocery Co.,* 216 Fed. 842 (C. C. A. 8th), I submit, is authority for the broad statement that title vests as of the date of the filing of the petition.

Applying the language of this Court to the facts in the Isaacs case it seems to me that it must be considered that what was meant by the statement that the title and right of possession to all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy was that the trustee might take such proceedings in a court of bankruptcy as might be necessary to make effective his right to the title and possession as of the date of the adjudication, at which date, the statute says, the title and right of possession shall vest in the trustee, to property in the possession of a third party who asserts no adverse interest recognized by the bankrupt law. This Court did not mean, I submit, to announce a principle under which, under all conditions and circumstances, every act performed by anyone with respect to the bankrupt's property, after the filing of the petition but before adjudication and without notice of the bankruptcy proceedings, is void. Had this Court meant this it would have been obliged, I submit, to have overruled *Louisville Trust Co.* v. *Comingor,* for the effect of that decision was that, after proceedings in bankruptcy have been instituted,

the State court may settle accounts of an assignee and make orders which will affect the bankrupt's property for this Court in that case in the concluding portion of its opinion said (46 L. Ed., at p. 416, 184 U. S. 26):

> "He (the assignee) had been restrained from settling his accounts in the state court in the action pending there, and the district court, instead of dissolving the injunction declining jurisdiction, and leaving the litigation to the state court, either in due course or by plenary suit, adjudicated the merits and entered a peremptory order that he should pay over, disobedience of which order was punishable by commitment. We think that in this there was error, and that the circuit court of appeals was right in its decree of reversal."

The opinion in the Comingor case follows the opinion in the Mueller case and both were delivered by Mr. Chief Justice Fuller.

The language of this Court in the Isaacs case, 282 U. S. 734, 75 L. Ed. 645, to the effect that the possession of the bankruptcy court "would not be affected by actions brought in other courts" applies to proceedings brought in other courts, after the property has been brought into the possession of the bankruptcy court, of a similar nature to that with which this Court was there dealing,—a foreclosure brought after adjudication. It has no reference to a case such as is here involved where, at the time of the filing of the petition in bankruptcy, the property was *in custodia legis* in the actual possession of a court having jurisdiction nor to such incidental effect as may be created upon the assets by permitting that Court to close its connection with the transaction in an appropriate manner. That this Court

intended to confine its remarks to such actions as it was dealing with is indicated by what it says is the reason underlying the rule which it announced, for it says (page 665):

> "This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; * * *."

This Court was there speaking of actual as distinguished from constructive possession of a court.

In *Straton* v. *New*, 283 U. S. 318, 75 L. Ed. 1060, the attempt was to enjoin a proceeding in a State Court which had for its purpose the enforcement of a lien of a judgment-creditor, the lien having been acquired and the proceeding in the State Court having been commenced more than four months before bankruptcy. This Court held that such a suit could not be stayed by the Bankruptcy Court and its decision is indicated by the eleventh headnote. The tenth, eleventh and twelfth headnotes have reference to the only matters which were before this Court. What this Court said upon the subject of the power of the bankruptcy court with respect to proceedings instituted within four months of the filing of the petition in bankruptcy is, I submit, obiter.

This Court in the Straton case indicated that any language from any case "must be read in connection with the facts on which it was predicated," and the only question before this Court in that case was, as stated in the opinion, 75 L. Ed., at p. 1084, 283 U. S. 320, as follows:

> "Where creditors have obtained and docketed judgments constituting liens on the real estate of defendant, and have instituted a creditors' suit in a state court to marshal and enforce the liens and sell the real estate subject thereto, does the bankruptcy of defendant occurring more than four months after the institution of the creditors' suit oust the state court of jurisdiction, or vest in the court of bankruptcy power to enjoin further proceedings in the state court?"

The answer of this Court was "no".

In the course of the opinion Mr. Justice Roberts said, 283 U. S., at p. 321, 75 L. Ed., at p. 1087,

> "The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The jurisdiction is exclusive within the field defined by the law, and is so far *in rem* that the estate is regarded as a *custodia legis* from the filing of the petition."

It is upon this language and upon the language of *Isaacs* vs. *Hobbs Tie & Timber Co.* to the effect that, upon adjudication, "title to the bankrupt's property vests in the trustee, with actual or constructive possession, and is placed in the bankruptcy court. * * * The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy * * *", that the Courts in *Silberberg* vs. *Ray Chain Stores*, based their conclusions, 54 Fed. 2nd, 650, affirmed 58 Fed. 2d 766, followed in the case at bar.

*Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 56 L. Ed. 208, is cited in *Straton* v. *New* as authority

to the effect that the estate is regarded as *in custodia legis* from the filing of the petition.

In that case this Court, speaking by Mr. Justice Day, used precisely the same language, so far as applicable here, as was used by Mr. Justice Roberts in *Straton* v. *New*. But in that case it was held that, notwithstanding all that was said, where an attachment suit had been brought after a petition in bankruptcy had been filed, a State court might proceed with it, the bankruptcy court not having moved in the bankruptcy case for upwards of five years. This Court said (222 U. S. 300, 56 L. Ed. 214):

> "The case presented therefore shows that the bankruptcy court, upon the filing of the petition in bankruptcy, found an outstanding creditors' agreement under which it was proposed to administer and distribute the estate. It declined to appoint a receiver; it recognized the propriety of the proceedings of the creditors' committee; it received reports of the creditors' committee, and allowed it for years to go on in the operation of the property, to mature a plan for the settlement of the debts outside of the court, and not contemplated in the bankruptcy act. The creditors in large numbers signified a purpose to take stock in a reorganization and for more than five years after the time of the filing of the petition, it was found by the supreme court of Missouri, had made no attempt to adjudicate the corporation a bankrupt, or proceed to the settlement of the estate under the requirements of the act."

This Court further said:

> "It is suggested that even now the bankruptcy court may proceed to an adjudication, but this suggestion is at war with all that has been done with the knowledge and sanction of the district court. As we

> have seen, the property to be administered in the bankruptcy court is that which belonged to the bankrupt at the filing of the petition, and then subject to his debts. This property can never be recovered. With the sanction of the district court much of it has been sold, its character has been changed, and it has been dealt with by the creditors' committee regardless of the provisions of the bankruptcy law. Many of the creditors have signified their purpose to adjust their claims by taking stock in a reorganization, or 50 cents on the dollar, of the amount of their claims. The whole proceeding makes it clear that the district court denied the adjudication and declined to exercise its jurisdiction as a bankruptcy court."

It is clear from this opinion that, in no true sense, does the State Court lose jurisdiction merely because of the filing of a petition in bankruptcy. If it wholly lost jurisdiction, then it would be wholly immaterial whether the Bankruptcy Court proceeded in the bankruptcy matter for the mere pendency of the petition would deprive the State Court of any right. So long at least as the proceedings were pending in the Bankruptcy Court, the State Court could not proceed. At least the petition in bankruptcy must be dismissed before any act of the State Court could have any validity.

But the petition in bankruptcy in the *Acme Harvester Co.* case, 22 U. S. 300, 56 L. Ed. 208, was still pending at the time the State Court proceeded. It had not been dismissed and it was urged that the Bankruptcy Court might still proceed with the bankruptcy petition, to which contention this Court answered (p. 214):

> "As we have seen, the property to be administered in the bankruptcy court is that which belonged

> to the bankrupt at the filing of the petition and then subject to his debts. This property can never be recovered. With the sanction of the district court much of it has been sold, its character has been changed and it has been dealt with by the creditors' committee regardless of the provisions of the bankruptcy law."

But, if the theory of the opinions of the Courts below is correct, all of this changing could have no effect for the acts of the State Court, which had created the changes, were void.

This Court, in *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed., at page 672, also said:

> "Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate."

citing

> *United States Fidelity & G. Co.* v. *Bray*, 225 U. S. 205, 56 L. Ed. 1055,

and that expression of this Court was relied upon below by respondent.

If, in all instances, a court of bankruptcy "is powerless to surrender its control of the administration of the estate" then how can the decision of this Court in *Acme Harvester* v. *Beekman Lumber Co.*, 222 U. S. 300, 56 L. Ed. 208, be justified? That decision rests upon the facts that the bankruptcy court "declined to appoint a receiver; it recognized the propriety of the proceedings of the creditors' committee; it received reports of the creditors' committee, and allowed it for years to go on in the operation of the property, to mature a plan for the settlement of the debts out-

side of the court, and not contemplated in the bankruptcy act." Was not this a clear surrender of the Court's control of the administration of the estate?

*United States Fidelity and G. Co.* v. *Bray*, 225 U. S. 205, 56 L. Ed. 1055, was a case in which, by leave of the bankrupt court, a proceeding had been instituted against the trustee in a court of equity, which proceeding obviously sought to have determined matters with respect to the administration of the estate and its distribution, which matters were by the bankruptcy act confided exclusively to the bankruptcy court. A creditor protested. It was in the light of these facts that this Court used the expression (225 U. S. 218, 56 L. Ed. 1062):

> "Of the fact that the suit was begun in the circuit court with the express leave of the court of bankruptcy it suffices to say that the latter was not at liberty to surrender its exclusive control over matters of administration, or to confide them to another tribunal."

The Acme Harvester Co. case was decided December 18, 1911, and the U. S. Fidelity & G. case in May, 1912, and there is nothing in the latter case which indicates that this Court intended to modify in any manner that which it had said in the former case.

The cases heretofore mentioned in this Court are impossible to reconcile, I submit, if the broad language of the opinions is to be considered without regard to the facts before this Court. When this Court uses the terms "paramount," "exclusive," "jurisdiction," "*custodia legis*," "*caveat* against the world," and the like, the facts must be considered to determine in what sense the respective terms were used.

And we must, I submit, always bear in mind that all of the law which we are discussing is judge made. There are no directions of the bankruptcy act providing for the situations which have been dealt with in the cases mentioned. "Judge-made," it may be "judge-altered" to meet existing conditions. The language of the Courts may be interpreted in such a way as to prevent the effect which would be created by giving full force and effect to the opinions below and to the opinions in *Silberberg* vs. *Ray Chain Stores*, 54 Fed. (2nd) 650, aff. 58 Fed. (2nd) 766, if that effect is not in accord with sound public policy for it is not to be conceived that Congress, unless it has spoken by express words, has intended to create a result which would not be in accord with a sound public policy. *First National Bank* v. *Maine*, 284 U. S. 312, 76 L. Ed. 313 (1932).

It is not difficult to ascertain what rule is deductible from these cases which will not have the effect of creating the result effected by the decision below. All that we are obliged to do is to confine the language of the respective cases to the facts before the courts at the times of the decisions.

True it is that, under some circumstances, a trustee in bankruptcy may assert rights as if his title and right of possession to the bankrupt's property related back from the date of adjudication to the date of the filing of the petition, and that, for certain purposes, the property of the bankrupt is to be considered as *in custodia legis* in the bankruptcy court as of the date of the filing of the petition, and true it is that, under certain conditions, a bankruptcy court may not surrender its jurisdiction. But we have found that it is likewise true that, under certain conditions, notwithstanding the pendency of a petition in bankruptcy,

a State court may proceed in an attachment suit instituted after the filing of the petition, *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 56 L. Ed. 208, and that a bankruptcy court may surrender its jurisdiction, and that an assignee, who is acting under a State statute, may, after the filing of a petition in bankruptcy and adjudication, be permitted to apply to the State court to pass upon his compensation, *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413 (last paragraph of the opinion).

I submit that the true rule to be deduced from the cases, applicable to a situation such as here presented, is that stated by Mr. Chief Justice Fuller in the Watts case, 190 U. S. 1, 47 L. Ed. 933, which has never been criticized by this Court. A decent regard for the integrity of the two systems of courts requires that this rule be scrupulously followed, and there is nothing in any opinion of this Court which prevents it from being followed if the language of the opinions be confined to the facts then before the Court.

Mr. Justice Sanford, when District Judge for the Eastern District of Tennessee, in the case of *In re Dayton Coal & Iron Co.*, 291 Fed. 390, as I have previously stated (p. 16), anticipated just what has occurred as a result of the application of the rule established by the Courts below, and pointed out that such a result would be against public policy and indicated how it could be avoided.

Parenthetically, it is apparent that this Court in *Straton* v. *New*, 283 U. S. 318, 75 L. Ed., at p. 1098, in stating that State insolvency laws which are tantamount to bankruptcy proceedings "are suspended while the latter remains in force, and proceedings under them are utterly null and void * * *," was referring to statutes which are bankruptcy acts providing for the discharge of debts. It is so well settled as

not to be the subject of debate that the New Jersey Corporation Act, so far as its insolvency features are concerned, is not suspended by the Bankruptcy Act. The statute provides for equitable *quo warranto*. *Gallagher* vs. *Asphalt Co.*, 67 N. J. Eq. 441.

If there is to be a well ordered administration of the law, with due regard to the bankruptcy act and the power of the Federal courts under it and of the power and authority of the State and Federal courts of equity, it must, I submit, be held that, notwithstanding the fact that, for some purposes, the property of the bankrupt is considered as *in custodia legis* in the bankruptcy court as of the date of the filing of the petition, if there follows an adjudication, it does not follow that, where property is already *in custodia legis* in a State or Federal court of equity at the time of the filing of the petition, the constructive "*custodia legis*" of the bankruptcy court forthwith supersedes the actual "*custodia legis*" of the State or Federal court of equity and it must be held that, before the power of the State or Federal court of equity ceases, there must be something more than a mere constructive "*custodia legis*" in the bankruptcy court established by the mere filing of the petition in bankruptcy. There must be actual intervention by the bankruptcy court asserted through the officers of that Court.

This Court in *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed., at page 665, stated that, when the jurisdiction of the bankruptcy court attached, the Court's possession could not be affected by actions brought in other courts and added that this was but an application "of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers" this "withdraws the property from the jurisdiction of all

other courts which, though of concurrent jurisdiction, may not disturb that possession."

The only question is as to when, where property is already *in custodia legis* in a State or Federal court of equity at the time of the filing of the petition in bankruptcy, does the succession take place. If the succession takes place as of the date of the filing of the petition in bankruptcy, no matter how long the adjudication may be delayed, no matter how long the bankruptcy court may refrain from interference by the appointment of a receiver or whatnot, all of the acts of the State or Federal court of equity are void and there is nothing for the State or Federal court of Equity to do under the circumstances except to shut down with no place to turn the property. But, if the succession take place upon the actual exercise or assertion of jurisdiction by the United States Bankruptcy Court, all difficulty passes away. If it be conceded that it is then that the succession takes place there is no difficulty in holding that, upon the assertion of an intent of the bankruptcy court to take into its possession the property of the alleged bankrupt through its receiver, or trustee, the State or Federal court of equity should be permitted to close its connection with the affair, and in the closing of that connection, that it must settle the accounts of its receivers, provide for their compensation and provide for the liquidation of indebtedness incurred upon the faith of its orders.

The District Court in *Silberberg* vs. *Ray Chain Stores,* 54 Fed. (2d) 650, treats the opinion of Mr. Justice Holmes in *Randolph* v. *Scruggs,* 190 U. S. 533, 47 L. Ed. 1165, as determining that a general assignment for the benefit of creditors, made within four months of bankruptcy, is void in the sense that, not only does the deed itself fall, but any act

performed by the assignee in dealing with the property is of no force or effect. It is clear, I submit, that Mr. Justice Holmes in the Scruggs case did not mean to so hold. If we read his entire opinion, we will find, I submit, that all that he means is that the deed is not to be given such an effect as to defeat the distribution of the assets of the debtor in accordance with the provisions of the bankruptcy act. He speaks of the assignment being "voidable only in case bankruptcy proceedings should be begun" and he then says (190 U. S. at p. 537, 47 L. Ed. at p. 1170):

> "It seems to us that it would be a hard and subtle construction to say, as seems to have been thought in Bartlett *v.* Bramhall, 3 Gray 257, 260, that when they were instituted they not only avoided the assignment, but made it illegal by relation back to its date when, if they had not been started, it would have remained perfectly good."

Further along in his opinion he speaks of the avoidance of the assignment relating back to the date of the deed "so far as his (the assignee's) services or services procured by him tend to the preservation or benefit of the estate" as a "mere fiction." The reporter preparing the headnotes for the case rather accurately indicated the effect of the opinion. The first headnote is (p. 1165):

> "A general deed of assignment is so far avoided by an adjudication in bankruptcy against the assignor on a petition filed within four months after the making of the assignment as to defeat the right of any claim against the bankrupt's estate to the preference given by such deed."

If the assignment is void in the broad sense of the word "void," then it would appear that any act performed by the assignee under it, such as a transfer of property to a *bona fide* purchaser for value, would be of no effect for, the deed being void, as of its date, any act performed under it would be likewise void. Certainly, no such situation as this should be created as the result of a "mere fiction."

The true rule is that the assignment cannot be given such an effect as to prevent a receiver or trustee in bankruptcy taking over the assets for distribution in accordance with the provisions of the bankruptcy act.

There is a logical distinction in principle between the bankrupt being divested of title by virtue of a general assignment in favor of creditors and being divested of title by virtue of proceedings under the New Jersey Corporation Act or under the inherent powers of an equity court. While, as stated by the District Court in *Silberberg* vs. *Ray Chain Stores,* 54 Fed. 2nd 650, the result may be the same in "forcing a distribution of the assets among those who may be entitled to them under the law" different rules may be applied in each case for there are different elements involved, and we must, I submit, keep in mind here, as always in dealing with the subject, that all of the law is judge-made, and that there are no express directions in the bankruptcy act providing for situations such as are involved either under general assignments or under receiverships established prior to the filing of a petition of bankruptcy but within a four months' period and that the "relation back," as stated by Mr. Justice Holmes in the Scruggs case, is but a "mere fiction." That "fiction," being designed to accomplish results which are in accord with sound public policy, when it appears that the "mere

fiction" will not accomplish such a result but will accomplish a result contrary to public policy, will not be indulged in although it might appear upon the face of things that, logically, it should be, and, if necessary, very fine distinctions will be found to justify a court in not indulging in it.

A general assignment for the benefit of creditors is a private act, voluntary on the part of the assignor. Title is placed in the assignee solely for the benefit of the assignor and creditors. A proceeding which results in a receivership under the New Jersey Corporation Act or by virtue of the inherent powers of a court of equity is not the outcome of a private act but of the act of the Court and, from the date of the taking over of the property by the receiver, the property is *in custodia legis*, which fact alone creates a different situation than that presented by the effect produced by a general assignment and the proceeding under the New Jersey Corporation Act is ancillary to the exercise of the power of the State to kill the corporation the proceeding being in the nature of an equitable *quo warranto*. *Gallagher* v. *Asphalt Co.*, 67 N. J. E. 441.

Under the New Jersey Corporation Act the title of the corporation is divested, not by its voluntary act or by the order of the Court, but by the express provisions of the statute (sec. 68, 2 C. S. of N. J., p. 1644), and, after the appointment of a receiver and the passing of title to him, he holds that title as a statutory agent, a separate and distinct entity, not as trustee for the corporation or for the creditors, or for the stockholders but as trustee for all. He is a separate independent ego, holding adversely to the corporation. It is pointed out by Vice Chancellor Church in *Shachat* v. *Standard Auto Supply Co.*, 106 N. J. E. 105, that

the receiver appointed under the statute is an independent entity created by the statute.

The Circuit Court of Appeals for the 3rd Circuit has held that a proceeding under the New Jersey statute in the Federal court also results in title being divested from the corporation and vested in the receiver and that, after the adjudication of insolvency and the appointment of a receiver, the cause ceases to be one *inter partes*. *Nottebaum* v. *Leckie*, 31 Fed. (2d) 556.

The effect of the divestiture of title of the corporation and the investiture of title in the receiver under such circumstances is quite different from the effect of a passing of title from an assignor to an assignee accomplished by a private assignment, and, added to the fact that the receiver does not hold title solely as trustee for the corporation and the creditors, the stockholders also being interested, is the fact that he is the representative of the Court, and, indeed, of the State, and the property, when in his possession, is in *custodia legis*. He not only takes the property of the corporation by force of the corporation act but he takes its franchises and privileges and he is granted the power by the statute to exercise them. There is nothing left to the corporation. While it is not killed until a decree of dissolution, its life is suspended. The receiver is the corporation plus.

It is not hard to find a distinction between the effect of a proceeding, which will invest a receiver with a title of this nature and the effect of a private assignment for the benefit of creditors vesting title in the assignee, as to the application of the bankruptcy act.

Vice Chancellor Stevenson in 1903 pointed out the distinction and its effect upon the application of the bank-

ruptcy act in *Singer* v. *National Bedstead Co.*, 65 N. J. Eq. 290, at page 306, and said:

> "It certainly does not follow that because a transfer of property is made an act of bankruptcy that therefore such property is recoverable by the bankruptcy trustee."

A trustee in bankruptcy takes the title of the bankrupt as of the date of adjudication and by relation back, in some cases, as of the date of the filing of the petition, but he takes only the title of the bankrupt, although he may have certain added rights conferred upon him by the bankruptcy act, to void, in the case of preferences or what-not, acts of the bankrupt, which assume to confer rights of property upon others, performed within four months of the filing of the petition. When he comes to take over the property in the custody of a State or Federal court receiver appointed under the New Jersey Corporation Act he finds that the bankrupt has no title and that the title is in the receiver, not in trust for the bankrupt, but in his own right as an entity and for the Court and holding adversely to the bankrupt. An assignee for the benefit of creditors has been said not to hold adversely to his assignor. But a receiver appointed under the New Jersey statute does hold adversely to the corporation. Moreover, the trustee finds the property already *in custodia legis*.

It cannot be said, under such circumstances, that the proceeding in the State or Federal court of equity, commenced within four months after the filing of the petition in bankruptcy, is void in the broad sense of the word "void".

It is sufficient to accomplish the purposes of the bankruptcy act that the receiver or trustee in bankruptcy shall succeed to the administration of the assets in accordance with the terms of the bankruptcy act. Of course, in the administration of the assets, no preferences created by the State statute, unless recognized by the bankruptcy act, are to be given. The distribution among creditors is to be made in accordance with the terms and provisions of the bankruptcy act. But, inasmuch as the receiver or trustee in bankruptcy finds the property of the corporation *in custodia legis* and in the possession of the State or Federal court receiver, holding adversely to the corporation, to the title of which and only to the title of which the trustee succeeds, he must get that property out of the jurisdiction of the State or Federal court of equity and it cannot be gotten out until such claims as there may be against it, to protect which the receiver holds adversely to the corporation, are satisfied and among those claims are those held by any creditors of the receiver where the debts have been incurred upon the faith of the State or Federal equity court proceedings and claims for compensation of the receivers and counsel. As I have pointed out, there is no jurisdiction which can settle those claims except the State or Federal court in equity.

The same rule should be applied, I submit, even if the receiver holding possession of the property at the time of the filing of the petition is but an equity receiver, for, here again, when the trustee or receiver in bankruptcy attempts to get the property he finds it already *in custodia legis*, and, unless the Court which has it *in custodia legis* is to be permitted to close its connection with the affair and compensate its officers, the integrity of that Court is destroyed.

*Moore* v. *Scott,* Circuit Court of Appeals for the 9th Circuit (Jan. 25, 1932), 55 Fed. (2nd) 863, was relied upon by the Court in *Silberberg* v. *Ray Chain Stores,* 58 Fed. (2nd) 766, and is in line with the decision below but since the opinion in *Moore* v. *Scott,* the Circuit Court of Appeals for the same Circuit, has decided *Crocker* v. *Kay,* December 5, 1932, 62 Fed. (2nd) 391, in which it held that the District Judge had no jurisdiction in summary proceedings to require the assignee for the benefit of creditors to pay over amounts disbursed *bona fide* subsequent to the debtor's bankruptcy for services rendered prior thereto citing and following *In re Jack Stolkin, Inc.,* 42 Fed. (2nd) 829, and the decisions of this court in *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 46 L. Ed. 413, and *Galbraith* v. *Vallely* 256 U. S. 46, 41 St. Ct. 415, 65 L. Ed. 823, and distinguishing the decision of this court in *May* v. *Henderson,* 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870. It did not mention its prior decision in *Moore* v. *Scott,* nor did it mention the decision of the Circuit Court of Appeals for the Sixth Circuit in *re Diamond's Estate,* 259 Fed. 70, upon which it relied in *Moore* v. *Scott,* notwithstanding the fact that the Circuit Court of Appeals in *re Jack Stolkin, Inc.,* 42 Fed. (2nd) 829, declined to follow in *re Diamond's Estate.* I submit that the decisions of the 9th Circuit Court of Appeals in *Moore* v. *Scott* and in *Crocker* v. *Kay* are, upon reason, inconsistent.

Following *In re Watts* and sustaining the power of the State Court to proceed to settle the accounts of, and make allowances to, its receivers is *In re Friedman Bros. Tailors, Inc.* (District Ct., Minn.), 19 Fed. (2nd) 243, at page 246,

At the time of the grant to Congress of the power to pass uniform laws with respect to bankruptcy throughout

the United States, it was well recognized that all Courts having jurisdiction to take over the possession of property, *ex necessitate,* had the right to compensate their officers who might be entrusted with the control of that property and to provide for the payment of debts created upon the faith of their orders. The theory of the constitution is that the judiciary of the United States and that of the states should be separate and independent, with one controlling power over the Courts of the States, when it comes to the matter of Federal Constitution and law, to wit, this Court. It was not considered that the lower Federal courts should come in conflict with, or exercise a supervisory control over, or be entitled, by direct action, to interfere with, the State courts. Can it be assumed that, by the grant of power to Congress to pass uniform laws with respect to bankruptcy, it was intended to vest in Congress the power to authorize the lower Federal courts to perform such acts as would prevent State courts taking control of property for any purpose whatsoever, for, if the State courts are to be prevented from compensating their officers and providing for the payment of debts incurred upon their orders after they have possession of the property, if within four months a petition in bankruptcy is filed, any State court which had any regard for its own dignity, would decline, in any case, to ever take possession of property (see the remarks of Vice-Chancellor Stevenson in *Singer* vs. *National Bedstead Co.,* 65 N. J. Eq. 290, at p. 308), but we need not be concerned with the extent of the power of Congress under the constitutional grant, for I submit that it is clear that Congress never intended by the bankruptcy act that State courts or Federal courts of equity, which had obtained possession of property, at times when there was no question as to the

jurisdiction of the Courts should, merely by the fact of the filing of a petition in bankruptcy, be forthwith divested of all power over the property so that they could not compensate their officers and provide for the payment of the debts created upon the faith of their orders and their possession of the *res*. There are no express provisions in the bankruptcy act announcing any such intent. There is an absence of any express provisions in the bankruptcy act which would take care of a situation which would be presented if the bankruptcy act is to be given the construction put upon it by the Courts below.

Congress cannot be charged with having been ignorant of the effect of any such rule as has been announced by the Courts below. It was foreseen by Judge Sanford in the Dayton Coal and Iron Co. case, 291 Fed. 390, which was decided in August, 1922, six months before he became a Justice of this Court. The effect is so disastrous as that it would seem to be apparent that, had Congress intended it, it would have said so in no uncertain language and would have provided what the Bankruptcy Court should do in the matter of compensating State and Federal equity court receivers and in providing for the payment of the indebtedness of such receivers. The act meticulously provides for all other matters with respect to compensation, power of receivers and trustees to incur debts, power to provide for the payment of such debts and the like. But as to this most important matter it is silent. It is only silent, I submit, because Congress did not conceive that any such construction should be put upon the statute as the Courts below have put upon it.

In the case at bar the bankruptcy receiver permitted the receivers of the State Court to proceed to operate the

business of the defendant corporation, sell and purchase merchandise and incur obligations and involve themselves.

It is impossible to determine how much of the moneys in the hands of the receivers in Chancery was derived from the sale of inventory which came to their possession at the time of their appointment and how much was derived from the sale of merchandise which they purchased. Certainly the trustee in bankruptcy is not entitled to the proceeds of the sale of merchandise which the receivers of the State Court purchased, those receivers being an entity, created by the statute of New Jersey, separate and apart from the corporation and holding title for the benefit of the creditors and stockholders of the corporation and adverse to the corporation as such. By the conduct of the receiver in bankruptcy in standing aside, it at least placed the receivers in Chancery in no worse position than had they been ancillary receivers.

In *Loeser* v. *Dallas*, 192 Fed. 909, the Circuit Court of Appeals for the 3rd Circuit, speaking by Judge Buffington, said:

> "The amendment of June 25, 1910, to the bankrupt law, providing for ancillary proceedings in bankruptcy, simply recognized by statute a practice which courts of bankruptcy, in pursuance of principles of equity and comity, had theretofore generally exercised. In the nature of things an ancillary receiver must be subject alone to, and obey the orders of, that court of which he is an officer. So obeying, it follows that to it alone must he account. Any other course would breed confusion in administration and go far toward making the exercise of ancillary jurisdiction impracticable; for if a court, in pursuance of comity, undertakes to exercise an-

cillary jurisdiction by administering local assets, which it alone has power and jurisdiction to administer, it follows that its hand must be free to administer by its own officer and to exact from him the full measure of duty. Such executive work it can only secure from an officer answerable to it alone. Kirker *v.* Owing, 98 Fed. 511, 39 C. C. A. 132; Sands *v.* Neely, 88 Fed. 133, 31 C. C. A. 424; *In re* Isaacson, 174 Fed. 406, 98 C. C. A. 614; Ames *v.* U. P. Ry. Co. (C. C.) 60 Fed. 966.

"These recognized principles and practices in ancillary proceedings we must assume Congress had in view in passing the amendment in question. When in such cases the receiver of an ancillary court makes his accounting to his own court, that court meets all requirements of comity to the primary court by affording the latter, through its proper officer, the opportunity to question the correctness of the accounting to the ancillary court. That was done in this case, and the contention that each creditor in the court of primary jurisdiction had to have notice, and, because the ancillary court had in its possession no list or knowledge of who such creditors are, that therefore the ancillary receiver must file his account in the primary court, is a *non sequitur*, based on the assumption that Congress, while authorizing ancillary proceedings, coupled therewith an extra territorial accounting to which no court should subject its own receiver."

The analogy between the Chancery receivers in the case at bar and ancillary receivers is apparent.

*Silberberg* vs. *Ray Chain Stores*, 54 Fed. (2d) 650, 58 Fed. (2d) 766, is not applicable as to its facts to the case at bar. In that case ancillary receivers in bankruptcy had been appointed, while in this case no ancillary receiver was

appointed and the Chancery receivers either had to continue to act substantially as ancillary receivers or abandon the property.

In *Loveless* v. *Southern Grocer Co.*, Circuit Court of Appeals for the 5th Circuit, 159 Fed. 415, the Court held:

> "If the order to pay the money into court stands, the summary proceeding against the trustee can be made the basis of proceedings for contempt if he fails to obey the order. It seems to us just and right that he should have an opportunity to present his accounts to a court and to have his claim for credits for payments made by him while receiver in the state court passed on. He should not be required to pay the money into court by a summary proceeding that deprives him of the right to a hearing on the disputed items of his account.
>
> "It is true that the bankruptcy proceedings operated to suspend the further administration of the insolvent corporation's estate in the state court; 'but it remained for the state court to transfer the assets, settle the accounts of its receiver, and close its connection with the matter. Errors, if any, committed in so doing, could be rectified in due course and in the designated way.' *In re* Watts and Sachs, 190 U. S. 1, 35, 23 Sup. Ct. 718, 47 L. Ed. 933."

In *In re Conservative Mortgage and Guaranty Company,* Circuit Court of Appeals for the 6th Circuit, 24 Fed. Rep. (2nd) 38, the Court said, at page 40:

> "The rules applicable to the facts of this case are that the bankruptcy court, by virtue of the adjudication, had paramount and exclusive jurisdiction over the administration of the bankrupt's property in its actual or constructive possession (Orinoco Co. *v.* Metzel, C. C. A. 6, 230 F. 40, 44); that the bank-

ruptcy court was entitled to and was in constructive possession of the bankrupt's property not adversely held by the state court's receiver (*In re* Diamond's Estate, C. C. A. 6, 259 F. 70, 73 *et seq.*), except so far as a lien had been obtained thereon through the action of the state court; that the execution, levy and bill in aid of execution, filed more than four months before bankruptcy, gave a lien upon the bankrupt's property to the extent of the judgment, interest and costs thereon, and costs of the bill in aid of execution, such lien not being an unlawful preference, and so not affected by the bankruptcy adjudication (*In re* Rohrer, C. C. A. 6, 177 F. 381; *In re* Dayton, etc., Co., 291 F. 390, 401, opinion by Judge (now Mr. Justice) Sanford); that as to the bankrupt's property not needed for such purpose the bankruptcy court is entitled to administer it, except so far as it may have been, at the time bankruptcy intervened, in the custody of the state court through its receiver for the purpose of lawful administration and disposition in the proceedings in aid of execution—in which case the state court could lawfully complete its administration under the rule that the jurisdiction first lawfully acquired will not be disturbed by the bankruptcy (*In re* Rohrer, *supra;* Metcalf *v.* Barber, 187 U. S. 165, 23 S. Ct. 67, 47 L. Ed. 122; Pickens *v.* Roy, 187 U. S. 177, 23 S. Ct. 78, 47 L. Ed. 128). Except as above stated, the four-months rule cuts no figure here. The bankrupt has otherwise an absolute right to the benefit of the Bankruptcy Act (11 U. S. C. A.). *In re* Yaryan Naval Stores Co. (C. C. A. 6), 214 F. 563, 565, 566."

To the same effect as *Loeser* v. *Dallas,* 192 Fed. 909, is *Park Lane Dresses* v. *Houghton & Dutton Co.,* 54 Fed. (2nd) 33 (C. C. A., 1st), in which the Court said:

> "While the jurisdiction of the bankruptcy court is ordinarily exclusive, where, under circumstances such as exist here, receivers have conducted a going business under a decree of court for nearly a year, hired and paid employees, bought and sold merchandise, and conducted the affairs of the debtor up to the point of disposing of its assets and distributing the proceeds, and the transfer to the court of bankruptcy would by reason of the extra expense entailed materially lessen the estate, the bankruptcy court may, in the exercise of a wise discretion, permit the state court to finish the work it has begun. *In re* Morosco Holding Co. (D. C.), 296 F. 516, 522; Bank of Dillon *v.* Murchison *et al.* (C. C. A.), 213 F. 147."

It has been held that a court of bankruptcy will not appoint a receiver where, at the time of the filing of the petition in bankruptcy, the assets of the bankrupt are in the hands of an assignee or State Court receiver.

*In re Oakland Lumber Co.*, 174 Fed. 634 (C. C. A. 2); *In re Spalding* (C. C. A. 2), quoted in the Oakland Lumber case; *In re Walsh, Inc.*, 295 Fed. 504 (C. C. A. 2d), and *In re Moore*, D. C., N. D., Ga., 42 Fed. 2d 475, at page 478, recognize the duty of the State Court after the filing of a petition in bankruptcy to preserve the property.

But if the decision below is correct, then it is submitted that the bankruptcy court should, in every instance, at once upon the filing of the petition, if there be a State receiver, appoint a receiver, for if it does not, the assets are left in the possession of a State receiver where the jurisdiction of the State Court has ceased, and if there subsequently be an adjudication in bankruptcy all of the acts per-

formed by the receiver of the State Court may be considered as void and of no effect. Such a result, I submit, would be most unfortunate.

## Conclusion.

**It is respectfully submitted that the orders of the Circuit Court of Appeals and of the District Court in all three cases should be reversed.**

Respectfully submitted,

MERRITT LANE,
Of Counsel with Petitioners.

## Appendix.

*New Jersey Statutes Cited.*

Sec. 65, N. J. Corporation Act, as amended, Pamphlet Laws of 1931, Chapter 221, page 545:

> "65. Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, or if its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, any creditor or stockholder, or stockholders, provided such stockholder or stockholders own at least ten percentum of the capital stock of such corporation, may by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the Court of Chancery for a writ of injunction and the appointment of a receiver or receivers or trustee or trustees, and the court being satisfied by affidavit or otherwise of the sufficiency of said application, and of the truth of the allegations contained in the petition or bill, and upon such notice, if any, as the court by order may direct, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter, or that its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, so that its business cannot be conducted with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from col-

lecting or receiving any debts or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands tenements or effects, except to a receiver appointed by the court, until the court shall otherwise order."

Sec. 66, N. J. Corporation Act, 2 C. S. of N. J., page 1643:

"66. Receiver; appointment; powers and duties. —The court of chancery, at the time of ordering said injunction, or at any time afterwards, may appoint a receiver or receivers or trustees for the creditors and stockholders of the corporation, with full power and authority to demand, sue for, collect, receive and take into their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description of the corporation, and to institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the corporation, and in his or their discretion to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation, and in case of mutual dealings between the corporation and any person to allow just set offs in favor of such person in all cases in which the same ought to be allowed according to law and equity; a debtor who shall have in good faith paid his debt to the corporation without notice of its insolvency or suspension of business, shall not be liable therefor, and the receiver or receivers or

trustees shall have power to sell, convey and assign all the said estate, rights and interests, and shall hold and dispose of the proceeds thereof under the directions of the court of chancery; the word receiver as used in this act shall be construed to include receivers and trustees appointed as provided in this act (P. L. 1896, p. 298)."

Sec. 68, N. J. Corporation Act, 2 C. S. of N. J., page 1644:

"68. Receiver; property of corporation vested in.—All the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto (P. L. 1896, p. 299)."

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CHARLES ELMORE

# Supreme Court of the United States

OCTOBER TERM, 1932.

## No. 680

ISAAC GROSS AND JOEL GROSS, PARTNERS AS GROSS & GROSS, SOLICITORS FOR COMPLAINANT IN CHANCERY, PETITIONERS,

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# BRIEF FOR RESPONDENT.

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Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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(Italics ours except where otherwise noted)

### Statement of Facts.

On or about the 3rd day of September, 1931, a bill was filed in the Court of Chancery of the State of New Jersey against Crosby Stores, Inc., for the appointment of a receiver for said company under Section 65 of the General Corporation Act of New Jersey, Revision of 1896. The Court appointed receivers on October 13th, 1931, who took possession of certain assets in New Jersey and continued to operate the New Jersey stores pursuant to the order of their appointment. Crosby Stores, Inc., operated a chain of five stores in New York, Massachusetts, Pennsylvania and New Jersey.

On October 14th, 1931, one day after the appointment of the State receivers, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York against Crosby Stores, Inc. The Company was duly adjudged bankrupt in that District on October 30th, 1931, of which the State court receivers had notice, and on December 1st, 1931, the Irving Trust Company was elected as trustee in bankruptcy. The trustee sold the assets of the bankrupt, including those in the State of New Jersey, on December 7th, 1931.

In order to consummate the sale the United States District Court for the Southern District of New York on December 11th, 1931 by the Referee ordered the State court receivers to show cause on December 16th, 1931 why they should not turn over all the property to the trustee in bankruptcy and why they should not account to the Federal Court. This rule was made absolute on December 14th, 1931 (Record, pp. 12 and 13).

On December 14th, 1931, on notice to the trustee in bankruptcy the Court of Chancery of New Jersey made the following allowances to its receivers and counsel:

| | |
|---|---|
| John Milton and J. S. S. Weissman, as receivers jointly | $6,000.00 |
| Gross & Gross and William Harris, as Solicitors for the receivers, jointly, besides their taxed costs | 4,000.00 |
| Gross & Gross as Solicitors for the Complainant | 350.00 |
| | $10,350.00 |

On December 21st, 1931, the United States District Court for the District of New Jersey in aid of the primary

jurisdiction and pursuant to an order to show cause dated December 16th, 1931, enjoined the State Court receivers from interfering with the trustee and enjoined them from disposing of the moneys paid to them under the State Court order of December 14th, 1931 (Record, pp. 26 to 28).

The allowances were made by the Court and paid to the respective persons after bankruptcy has supervened. The trustee in bankruptcy thereupon filed a petition in the United States District Court for the District of New Jersey, alleging, among other facts, the foregoing, and asserting that the payments to the receivers were null and void and were in violation of the provisions of the Bankruptcy Act, and that it was the duty of the State Court receivers to file their accounts in the Bankruptcy Court and with their counsel appointed by the State Court to apply to the Bankruptcy Court for reasonable compensation for services rendered by them enuring to the benefit of the bankrupt estate.

The petition prayed that an order be made requiring the receivers and their counsel to turn over to the trustee in bankruptcy the assets of the bankrupt estate in their possession, including the allowances paid to them as set forth above and to file their accounts in the United States District Court (Record, pp. 1 to 41). The order was granted.

All the facts set forth in the trustee's petition were conceded below. **No objection was made to the jurisdiction of the Court or that the matter should be decided in a plenary proceeding. The parties appeared and argued the matter on the merits** (Record, p. 43).

*The sole question presented is: Did the Court of Chancery of New Jersey have the power to fix the fees of its*

*receivers and their counsel after bankruptcy had supervened within four months of the filing of the Bill of Complaint in and the appointment of the receivers by the State Court?*

## History of the Conflict Between the New Jersey Court of Chancery and the United States District Court Sitting in Bankruptcy.

No statement of the issue involved here would be complete without a brief survey of the conflict that has raged in New Jersey with respect to the question as to which court should administer the affairs of a bankrupt corporation, the New Jersey Court of Chancery or the United States District Court.

New Jersey has on its statute books a corporation act* which is efficient for the winding up or re-organization of insolvent corporations. The Court of Chancery of New Jersey has been most zealous in maintaining its jurisdiction. The conflict manifested itself in

*Singer* v. *National Bedstead Manufacturing Co.*, 65 N. J. Eq. 290 (1903),

an opinion by Stevenson, V. C., who said at page 299:

> "As the Bankruptcy Act stood until the recent amendments I am unable to perceive how, when the Court of Chancery has acted under the New Jersey Statute relating to insolvent corporations * * * and has then as a necessary result appointed a receiver of the corporate assets; a receiver subse-

* See Appendix A.

quently appointed by a bankrupt court—*i. e.*, appointed subsequent to the vesting of the assets in the Chancery receiver under our statute or a trustee appointed under a subsequent adjudication of bankruptcy—can acquire title to those assets.

The title which the trustee in bankruptcy takes is defined in the Bankrupt Act and practically includes only the property which belonged to the bankrupt at the time of the adjudication and property theretofore transferred by him by way of preference or in fraud of creditors."

And at page 307 he said:

"Therefore the order of this Court will direct that the receiver of this Court present his account and report, that proper allowances to the two receivers of this Court be paid and that the residue of the assets be turned over to the bankruptcy receiver, and that the receiver appointed by this Court be thereupon discharged from his office."

From this practice inaugurated in 1903 there was no deviation until the present time and the Federal Court in New Jersey tolerated this procedure until the cases of

*Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734

was decided by this Court, with the resultant opinion in

*Silberberg* v. *Ray Chain Stores, Inc.*, 54 Fed. (2) 650 (D. Ct.), 58 Fed. (2) 766 (Circuit Court). Certiorari denied by this Court, *Sub nomine;*

*Winne & Casey* v. *Silberberg*, 77 L. Ed. 35, Vol. I, Adv. Rep. 1932 Term, page 35.

After the *Singer* case, *supra,* there was an interval of peace until

> *Cavagnaro* v. *Indian Tire & Rubber Co.,* 90 N. J. Eq. 532 (1919) and
> *Cudahy* v. *N. J. Dairy Products Co.,* 90 N. J. Eq. 541 (1919)

were decided, both opinions being by Lane, V. C.

In the *Indian Tire & Rubber Co.* case (*supra*), directors of a New Jersey corporation were held guilty of contempt of court for filing a petition in bankruptcy after the New Jersey Court had appointed Chancery receivers and had restrained the company, its officers, directors and agents from exercising the privileges and franchises granted by the State of New Jersey. The decision can be justified on the ground that the directors and officers prior to the filing of the petition in bankruptcy had removed property from the possession of the State Court receiver.

In the *Cudahy* case (*supra*), the Court laid down the rule that State Court receivers after bankruptcy has supervened, *must* first account to the State Court, receive their compensation from the State Court and then turn the balance over to the trustee in bankruptcy. The Court held:

> "The receiver may not, without the consent of this Court, either submit to the jurisdiction of the bankruptcy court to fix his compensation, or turn over to the trustee in bankruptcy, or to any other officer of the bankruptcy court, or of any court, any of the assets within his control."

This case was a logical extension of the rule laid down in *Singer* v. *National Bedstead Manufacturing Co.* (*supra*).

During this period the State Courts carried the battle directly to the Federal Court without any let up in their drive. Every type of order decree or injunction which could in any way hamstring the Federal Court and prevent creditors and the corporation from applying for relief to the Federal Courts was availed of in the State Court. The terrible weapon of contempt was threatened and used. The State Court, among other things, enjoined:

> (a) Creditors from instituting, prosecuting or continuing the prosecution of any action instituted under and by virtue of the United States Bankruptcy Court without first giving notice to the equity receiver.[1]
>
> (b) The corporation, its officers, servants and agents from taking any corporate action for the purpose of having a receiver appointed in any other cause.[2]
>
> (c) Stockholders and all other persons from instituting, prosecuting or proceeding with any action in any court—at law or in bankruptcy.[3]

In one case[4] the State Court directed its receiver not only to retain in his possession all of the assets but not to surrender the assets to a trustee in bankruptcy until he had accounted to and received his compensation from the State Court.

The Court recently issued orders in at least two cases[5] directing officers, directors and creditors to show

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[1] See Appendix B.
[2] See Appendix B.
[3] See Appendix B.
[4] See Appendix B.
[5] See Appendix B.

cause why they should not be punished for contempt for filing petitions in bankruptcy after the State Court had appointed equity receivers.

It is manifest therefore that the struggle has been sharp and bitter. Recently the conflict dwindled down to the question presented in the case at bar, which Court has the power to fix fees? It would appear, except for sporadic injunction orders, that the State Court has yielded on every other point relating to the paramount jurisdiction of the Federal Court sitting in bankruptcy, namely, that creditors may file involuntary petitions; that the corporation may file a voluntary petition or consent to be adjudicated in involuntary proceedings, notwithstanding the fact that the State Court had appointed a State receiver. They still vigorously maintain, however, that the right to fix fees is inherent in their Court.

When this Court decided *Isaacs* v. *Hobbs Tie & Timber Co.* (*supra*), the United States District Court for the District of New Jersey through Judge Fake critically re-examined the practise that had prevailed in New Jersey for about thirty years and came to the conclusion that it was in violation of the Bankruptcy Act of the United States. The first case that came before him was

*Silberberg* v. *Ray Chain Stores, Inc.* (*supra*).

In that case Judge Fake *himself had appointed Federal equity receivers* in the United States District Court for the District of New Jersey. Bankruptcy supervened and he held that he was without power to fix the fees and that the application would have to be made in the Bankruptcy Court. That case was affirmed by the Circuit Court of Appeals for

the Third Circuit and certiorari was denied by this Court (*supra*).

In the answer to the petition for the writ of certiorari in the Ray Chain case mention was made of the fact that the case at bar was en route to this Court and it was hoped that the Court would review both orders to the end that a final opinion would be rendered which would definitely terminate the unseemly controversy between courts of independent sovereignties. A survey of the conflict may be found in

**The current conflict between the Court of Chancery and the Bankruptcy Court (1932) 1 Mercer Beasley Law Review, pages 3 to 19.**

*Note (1932) 41 Yale L. J. 1234-1237.*

After this Court refused to review the Ray Chain case the Court of Chancery promptly held it was only applicable to a Federal Court sitting in equity and that it did not and could not apply to a State Court. They stated in effect they would not follow it until this Court spoke authoritatively on the subject and doubted the power of the Court so to speak. The latest expression by the State Court in this field of troublesome jurisdiction is

*Isenberg* v. *Kimberley Phonograph Co. of New Jersey*, 111 N. J. Eq. 195 (1932).

The Court held at page 198:

> "The trustees in bankruptcy appear by their solicitors, and object not only to the making of the order for allowances in the amount and in the form asked by the receiver, but to the making of any

allowances whatever by this court; their contention being that this court is without power to make such allowances under the authority of Isaacs *v.* Hobbs Tie & Timber Co., 282 U. S. 734; Silberberg *v.* Ray Chain Stores, Inc., 54 Fed. Rep. (2) 650, aff'd 58 Fed. Rep. (2d) 766; Moore *v.* Scott, 55 Fed. Rep. (2d) 863; Lion Bonding & Surety Co. *v.* Karatz, 262 U. S. 640, and Bloch *v.* Bloch, 86 N. Y. Supp. 1047.

"The proposition that this Court, after an adjudication of bankruptcy, is without jurisdiction or power to fix the compensation of its receiver duly appointed on adjudication of insolvency prior to any bankruptcy proceedings, is one *in which this court cannot concur and to which it cannot yield unless upon explicit and controlling authority.* In the view of this court, the federal legislation does not purport expressedly or impliedly, to effect any such result; *and even if it did, the constitutional validity of such an attempt would be, to say the least, open to serious question.*

"Of the decisions mentioned above, the first is by no means an explicit authority for the proposition of the trustee; the next two are not in point, for they involve federal equity receivers instead of receivers of state courts; the expression in the fourth is dictum; and the last is in nowise controlling upon this court."

## POINTS UPON WHICH THE RESPONDENT RELIES.

The propositions for which the respondent respectfully contends, and upon which it relies, are the following:

I.

**The case at bar does not involve the question of jurisdiction by summary process or plenary proceeding.**

II.

**The jurisdiction of the United States District Court in Bankruptcy is paramount.**

III.

**The State Court is without power to fix the fees of its officers, bankruptcy having supervened within the four months' period.**

IV.

**The power to fix fees after bankruptcy supervenes is exclusively in the Bankruptcy Court.**

V.

**A State Court receiver is entitled to and will receive from the Bankruptcy Court just compensation and the repayment of his expenses for benefiting or preserving the bankrupt estate.**

# ARGUMENT.

## POINT I.

**The case at bar does not involve the question of jurisdiction by summary process or plenary proceeding.**

The first specification of error in the petition for writ of certiorari (p. 13 of Petition) sets up that the United States Circuit Court of Appeals erred in holding that it had jurisdiction in bankruptcy in a summary proceeding to direct the state court receivers and their counsel to turn over to the trustees in bankruptcy the fees which had been paid them after the petition in bankruptcy had been filed.

It is well, therefore, at this time to give the background of the litigation. The trustee filed his petition as it is set forth in the Record (pages 1 to 41). The respondents filed a special appearance with the Clerk of the United States District Court objecting to the jurisdiction of the Court to hear the matter in a summary way. The respondents then withdrew their special appearance and submitted to the jurisdiction. They filed no answer to the petition of the trustee and conceded that the facts stated in the petition were correct and argued the matter on the merits (Record, p. 43). The Court held that the issue was squarely within *Silberberg* v. *Ray Chain Stores, supra,* and decided in favor of the trustee (Record, p. 43). The order granting the prayers of the petition is set forth in full in the Record (pages 44 and 45), and recites "that the matter came on regularly to be heard in the presence of" counsel (Record, p. 45). No objection to the jurisdiction was made or argued

before Judge Fake sitting below. No objection was made in the Circuit Court of Appeals on the argument on the appeal of the order and the matter was neither argued nor briefed by respective counsel.

The first time the objection appears is in the petition for the writ of certiorari to this Court. The reason for the assignment of error is due to some superfluous language by Judge Thompson in the Circuit Court of Appeals. In the opinion of the Circuit Court of Appeals, Judge Thompson said:

> "The State receivers contend that recovery of the compensation and fees already allowed could be had only in a plenary suit and that the District Court had no jurisdiction in a summary proceeding to order them to account to the trustee."

We are at a loss to understand how the Court arrived at the conclusion that the appellants in the Court below, the petitioners here, made such a contention. It was not made orally at the argument before the Court; it does not appear anywhere in the record below; it does not appear in the briefs below. We, therefore, submit that an objection to the jurisdiction consented to below cannot be urged on writ of certiorari in this Court.

An objection to the jurisdiction to hear a matter in a summary way may be waived. The jurisdiction may be conferred on the Bankruptcy Court by consent.

> *Bardes* v. *First National Bank of Hawarden*, 178 U. S. 524, at 539, 44 L. ed. at page 1175.

See also

> *MacDonald* v. *Plymouth County Trust Co.*, 42 Sup. Ct. 505; 76 Law ed., page 1093; 286 U. S. 263,

where the Court held that a referee may, if the parties consent, try the issues which must otherwise be tried in a plenary suit brought by the trustee. It follows therefore if the jurisdiction may be conferred on the referee it most certainly can be conferred on the Court itself. See also

*Page* v. *Arkansas Natural Gas Corp.*, 52 S. Ct. 5071; 76 L. ed., page 1096; 286 U. S., page 269.

The facts in this case are squarely within

*Clark* v. *Larremore*, 188 U. S. 486, 47 L. ed. 555; 23 Sup. Ct. Rep. 363,

set up in footnote 25 to *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 425, 66 L. ed. 770, 44 S. Ct. 396, where it is pointed out that the objection to the jurisdiction was first raised but later withdrawn.

We therefore submit that the objection to the jurisdiction having been waived below it cannot be raised anew in this Court.

Assuming that it has been properly raised, the contention of the petitioners is conclusively determined by the opinion of this Court in

*May* v. *Henderson*, 268 U. S. 111.

> "In consequence, any person acquiring an interest in property of the bankrupt or his assignees for the benefit of creditors, adverse to the creditors, after the filing of a petition, with notice of it, may be directed to surrender the property thus acquired by summary order of the bankruptcy court. Re Denson, 195 Fed. 854; Re Rudnick, 158 Fed. 223; and see White *v.* Schloerb, *supra.*"

* * * * * *

> "We rest our decision rather on the duty of assignees for the benefit of creditors to account in a summary proceeding for the property which they have received within four months of the bankruptcy, and to make restitution of the value of the property of the bankrupt which they have dissipated without a colorable claim of right."

See also *Re Diamond Estate*, 259 Fed. 70 (C. C. A., 6th), 1919.

## POINT II.

**The jurisdiction of the United States District Court in Bankruptcy is paramount.**

It is rather remarkable that at this stage of our Federal Jurisprudence it becomes necessary to cite cases relating to the paramount jurisdiction. The Constitution of the United States provides that:

Section 8, sub-division 4:

> "The Congress shall have power to establish * * * uniform laws on the subject of bankruptcies throughout the United States."

Congress has enacted various Bankruptcy Acts, the most recent of which is the Bankruptcy Act of 1898, Section 9, U. S. Comp. Statutes (1910), page 11,007, and that Act creates the United States District Courts as bankruptcy courts. The Act provides that

> "Courts of Bankruptcy shall include the District Courts of the United States and of the Territories * * * Bankruptcy Act of 1898, Section 1, sub-division (8)."

The purpose of the Constitutional provision hereinabove referred to was discussed only casually in *The Federalist No. XLII*, page 292, because its necessity was so apparent. James Madison wrote as follows:

> "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states, that the expediency of it seems not likely to be drawn into question."

In *Isaacs* v. *Hobbs, supra*, this Court said:

> "The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors."
>
> • • • • • •
>
> *"Indeed a Court of Bankruptcy itself is powerless to surrender its control of the administration of the estate."*

This was merely a restatement of the law as found in the host of earlier cases.

*Sturges* v. *Crowninshield*, 4 Wheat. 122;
*Mueller* v. *Nugent*, 184 U. S. 1;
*Watts & Sachs*, 190 U. S. 1;
*International Shoe Co.* v. *Pinkus*, 278 U. S. 261;
*U. S. F. & G. Co.* v. *Bray*, 225 U. S. 205;
*Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 640;
*Larazus* v. *Prentice*, 234 U. S. 263.

These representative cases have imbedded in our law the doctrine that in the administration of the assets of a bankrupt the Federal Court sitting in bankruptcy is paramount and once bankruptcy has supervened within the four months' period, all courts, whether State Courts or Federal Equity, are prohibited from interfering with the administration of the affairs of a bankrupt. This disposes of the statement set forth on page 6 of petitioners' brief that "the receiver in bankruptcy and the trustee in bankruptcy acquiesced in the conduct of the business located in New Jersey by the receivers in Chancery." A bankruptcy court cannot surrender the administration of its trust imposed upon it by the Constitution and the Bankruptcy Act of the United States as was clearly set forth in *United States Fidelity & Guaranty Company* v. *M. J. Bray* and *Isaacs* v. *Hobbs Tie & Timber Co., supra.* It would have been futile in the light of the conflict between the State Court and the Federal Court sitting in bankruptcy to have appointed a receiver in bankruptcy and attempted to wrest this property out of the possession of the State Court receiver in view of the orders then being entered in the Court of Chancery of the State of New Jersey directing its receivers not to surrender assets to receivers or trustees in bankruptcy, but to hold them adversely to said receivers and trustees (see Appendix B). It is because of this conflict and this refusal by the State Court that this case is now being presented for final disposition.

The New Jersey Court of Chancery insists that although the states ceded this power to the Federal Government when the Constitution was adopted it nevertheless retained a scintilla of jurisdiction to fix the fees of State Court receivers appointed under the State Corporation Act.

## POINT III.

**The State Court is without power to fix the fees of its officers, bankruptcy having supervened within the four months' period.**

*Isaacs* v. *Hobbs, supra,* at once focussed the attention of bench and bar on the Constitutional provisions hereinabove referred to, which had been ignored, overlooked or misunderstood for some time. In

*Mueller* v. *Nugent,* 184 U. S. 1,

this Court said that:

> "The filing of the petition is a caveat to all the world, and in fact an attachment and an injunction."

The doctrine of this case was vigorously reasserted in

*May* v. *Henderson,* 268 U. S. 111,

where the Court held in addition:

> "that the Courts of Bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of an adverse claim."

In

*Straton* v. *New,* 283 U. S. 318,

the Court again held that upon the filing of a petition in bankruptcy the

> "proceeding is so far *in rem* that the estate is regarded in *custodia legis* from the filing of the petition."

* * * * * *

> "It follows that liens cannot thereafter be obtained *nor proceedings be had in other courts to reach the property,* the District Court having acquired the exclusive right to administer all property in the bankrupt's possession" (citing cases).

See also *Taubel-Scott Kitzmiller Co.* v. *Fox,* 264 U. S. 425.

Yet despite these clear-cut unmistakable declarations by this Court the New Jersey Court of Chancery still asserts it alone may and should fix the fees of its receivers even after the filing of a petition in bankruptcy which is, as the Federal Courts say, THE ASSERTION OF THE PARAMOUNT JURISDICTION.

An examination of the cases reveals that they fall in four groups.

**Group I.**

Appointment of a State Court receiver and within four months thereafter a petition in bankruptcy is filed against the insolvent corporation. The State Court receiver then transfers *all* of the assets to the bankruptcy receiver or trustee. May the State Court then fix the fees of its appointee?

Even the New Jersey Court of Chancery concedes that in this type of case it will not fix the allowance of its receiver. In

> *Cudahy* v. *N. J. Products Co.,* 90 N. J. Eq., 541 (*supra*),

the Court, by Lane, V. C., said:

> "In such cases, however desirous the individual members of the Court may be to lend any aid or as-

> sistance possible to the Federal Courts, the Court will not ordinarily fix the compensation or indicate officially its views as to the proper amount. The Court will not ordinarily make an order or decree which cannot be made effective by its own process."

Cases in Group I present no difficulty whatsoever. They solve themselves. The assets having been surrendered the State Court is powerless to fix and pay the fees.

**Group II.**

Appointment of a State Court receiver and the conversion by him of all of the assets into cash, the passing of his account, the fixing of his fees *and the payment thereof prior to the filing of the petition in bankruptcy within the four months' period.*

The rule governing this case falls within:

> *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18 (generally known as the Comingor case);
> *Galbraith* v. *Vallely,* 256 U. S. 46;
> *May* v. *Henderson, supra.*

Much stress may be laid upon the *Comingor case, supra,* but we submit that the petitioners can gain nothing therefrom. The facts in that case were as follows:

The assignee had disbursed moneys and had paid to himself his assignee's fees PRIOR TO THE FILING OF THE PETITION IN BANKRUPTCY. The referee directed him to turn the fund over as a result of a summary proceeding commenced against him in the bankruptcy court. The assignee *filed an objection to the jurisdiction of the Court by summary proceedings asserting he was an adverse claimant.*

This Court held that since he had expended the moneys *prior to the filing of the petition in bankruptcy,* he was in the position of a *bona fide* adverse claimant and the moneys so adversely held could not be reached by the summary process of the bankruptcy court. He was entitled to the benefits of a plenary suit.

No such facts are presented in the case at bar. There was no objection to the jurisdiction of the Court. The respondents had waived it by withdrawing their special appearance. Second, the fees in this case were paid *after* the petition in bankruptcy had been filed, since it is a fact that the bankruptcy petition was filed one day after the appointment of the State Court receivers.

In *Galbraith* v. *Vallely* (*supra*) the facts were precisely the same as in the Comingor case and the decision reaffirmed the doctrine that the procedure was to be by summary process.

The doctrine of the Comingor case was reaffirmed in *May* v. *Henderson* (*supra*), but the Court justified summary procedure since the payments in the May case were made after the filing of the petition in bankruptcy.

The Comingor, Galbraith and May cases all dealt with assignees. However, the doctrine with respect to assignees has been extended to receivers.

*Stellwagen* v. *Clum,* 245 U. S. 606.

**Group III.**

Appointment of a State Court receiver, the conversion by him into cash of all the assets and the filing of a petition in bankruptcy within four months and *before* his

accounts have been approved and his fees fixed and paid by the State Court.

**Group IV.**

Appointment of a State Court receiver and the filing of a petition in bankruptcy within four months and *before* the State Court receiver has converted the assets into cash.

The cases within Groups III and IV present the difficult ones for the Courts. While some Courts treat Groups III and IV separately, they will be considered as one here, for, it is submitted, an analysis of the cases indicates there is no difference in principle between the two problems.

One of the most recent cases in New Jersey is

> *Colton* v. *Bankshares Corp. of the U. S.*, 108 N. J. Eq. 417, 155 Atl., p. 471,

wherein the Court said:

> "The practise as laid down in Schachat *v.* Standard Auto Supply Co., 106 N. J. Eq. 105, 150 Atl. 183, is that indicated in *Re* Watts & Sachs, 190 U. S. 1, 23 S. Ct. 718, 47 L. ed. 933, which has ever since been the guide of Courts and lawyers in this State, that the Court of primary jurisdiction may supervise the administration of its receivers and fix their compensation, and it will be adhered to."

In

> *Schachat* v. *Standard Auto Supply Co.*, 106 N. J. Eq. 105 at 110,

the Court dismissed the language of Mr. Justice Brandeis in *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 64 (*supra*), as follows, Mr. Justice Brandeis speaking for the Court said:

> "Even where the Court which appoints a receiver had jurisdiction at the time but loses it, as upon supervening bankruptcy, the first court cannot thereafter make an allowance for his expenses and compensation. He must apply to the bankruptcy court."

Vice-Chancellor Church said in the Schachat case, *supra:*

> "The remarks of Mr. Justice Brandeis were purely *obiter.*"

Since every case in the State of New Jersey relies upon

*Re Watts & Sachs,* 190 U. S. 1,

it is necessary critically to re-examine that case to see whether it justifies the conclusions which the New Jersey Court has so vigorously asserted.

A State Court receiver had turned over the property to the bankruptcy receiver. Thereafter, on the advice of their attorneys, the State Court receiver, through a Sheriff, forcibly seized the property and took it from the possession of the bankruptcy receiver. The sole question in the case, therefore, was whether the attorneys who had given their advice in good faith and in the discharge of their duty as counsel could be deemed guilty of contempt of the bankruptcy court and punished as contemnors.

The Court held the attorneys could not be adjudged guilty of contempt of court, but during the course of its opinion made certain statements which the State Courts seized and relied upon for their decisions. The first statement is as follows:

> "The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be

> taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit; but that rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity, and accordingly the receiver of the district court brought his appointment to the knowledge of the Floyd Circuit Court and requested the delivery of the assets."

It may be argued that in this language the Court meant to say that the general rule, which applies between courts of concurrent jurisdiction while not strictly applicable as between courts of paramount and subordinate jurisdiction, does nevertheless obtain as a "rule of comity," and if the words "rule of comity" are understood to mean a binding and controlling rule of law, a plausible support is thus found for the view that in fact the Federal Bankruptcy Court *should* adopt the same rule which the Federal Court sitting in Equity applies where it merely has concurrent jurisdiction with the State Courts.

The complete answer to this argument however, is that the words "rule of comity" as used by Chief Justice Fuller means no more than a "rule of etiquette" rather than a "rule of law". The word "comity" is defined in *11 Corpus Juris, page 1235,* as follows:

> "*Comity.* Generally, complaisance, concession, courtesy, courtesy between equals, friendly civility, respect, reciprocity, a disposition to accommodate, good will, the granting of a privilege, *not of right* but of good will, a willingness to grant a privilege, *not as a matter of right,* but out of deference and good will."

In

*The Paquette Habana*, 175 U. S. 677, 44 L. ed. 320 at page 326,

the Court, referring to an opinion in the English case of *The Young Jacob and Johanna*, 1 C. Rob. 20, says:

> "The opinion begins by admitting the known custom in former wars not to capture such vessels; adding, however, 'but this was a rule of comity only, and not of legal decision.'
>
> * * * * * * *
>
> "The word *comity* was apparently used by Lord Stowell as *synonymous with courtesy or good will.*"

The same view of the meaning of the word "comity" was expressed by this Court in

*Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382,

where the Court said by Mr. Justice Peckham:

> "At the outset it seems to us proper to notice the views regarding the action of the Court below, which have been stated by counsel for the appellants, the public service commission in their brief in this court. They assume to criticize the court for taking jurisdiction of this case, as precipitate, as if it were a question of *discretion* or *comity*, whether or not that court should have heard the case. *On the contrary there was no discretion or comity about it.* When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction."

The true nature of the so-called "comity doctrine" appears fully when the real rule is recognized that it

applies only between courts of *concurrent* jurisdiction and does not apply as between courts of paramount and subordinate jurisdiction. This was enunciated by this Court in

*Covell* v. *Heyman* 111 U. S. 176, 28 L. ed. 391,

where the Court said:

> "A principle", he said, 'which is essential to the dignity and just authority of every court and to the *comity* which should regulate the relations between *all* courts of concurrent jurisdiction;' 'that principal is,' he continued, 'that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession *unless it be some court which may have* a direct supervisory control over the court whose process has first taken possession, or *some superior jurisdiction* in the premises."

It is this doctrine that fundamentally underlies *U. S. F. & G. Co.* v. *Bray,* 225 U. S. 205, where the Supreme Court laid down the rule that a Court of Bankruptcy:

> "was not at liberty to surrender its exclusive control over matters of administration, or to confide them to another tribunal."

See also

*Harkin* v. *Brundage,* 276 U. S. 36;
*Welch* v. *O'Neill,* 245 Fed. 261 (C. C. A. 3rd);
*People* v. *N. Y. City Rwy. Co.,* 107 N. Y. Supp. 247.

Chief Justice Fuller recognized this doctrine that the bankruptcy court's jurisdiction is exclusive, for he said in the *Watts* case:

> "The bankruptcy law is paramount, and the jurisdiction of the Federal Courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

It is therefore apparent that Chief Justice Fuller merely used the words "rule of comity" in this case in the sense of "courteous," for he said, and

> "accordingly the receiver of the District Court (Federal Court) brought his appointment to the knowledge of the Floyd Circuit Court and requested the delivery of the assets."

But Vice-Chancellor Backes in *Colton* v. *Bankshares Corp. of U. S.* (*supra*), used the word "comity" as a controlling rule of decision, viz.:—"*Comity which obtains as between courts of concurrent jurisdiction.*" In support of his views as to the "comity rule" he cites

> *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 38, 52 L. Ed. 379,

which case however merely involved *concurrent* jurisdiction between Federal and State Courts and not a question of paramount versus inferior jurisdiction as is presented in the case at bar.

The second statement made by the Supreme Court in the *Watts* case (*supra*) and which language is the veritable bulwark of the Court of Chancery opinions is as follows:

> "It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvents' estate in the State Court, but it remained for the *State Court to transfer the assets,* settle the accounts of its receiver and close its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way."

The State Courts have undertaken to determine that the words "settle the accounts" means also "and fix the allowances for the receiver." If the order of the words means anything, the duty of the state receiver is to transfer the assets first. In

> *Bouvier's Law Dictionary,* page 107 (Third Revision being Eighth Edition),

this definition of "settling the account" is given:

> "A statement of the receipts and payments of an executor, administrator or other trustee of the estate confided to him."

See also 53 *Corpus Juris,* pp. 368, *et seq.* and pp. 381, *et seq.,* where it will be found that the matter of accounting by receivers and the settlement of receivers' accounts are treated as a wholly separate and distinct matter from the treatment of allowances to receivers. It is possible that a court might settle the accounts—that is, approve the receipts and disbursements and yet not award compensation.

In *Silberberg* v. *Ray Chain Stores* (*supra*), Judge Fake with patient research traced the further developments of the Watts case and disclosed that the State officers sought their allowances not from the State Court, but from the Federal Court and compensation was denied them because

compensation could only be awarded them for services rendered in benefitting and conserving the estate.

See

*Re Zier & Co.*, 127 Fed. 399 affirmed in 142 Fed. 102 (C. C. A. 7th).

If the language of Chief Justice Fuller had the meaning as set forth in *Colton* v. *Bankshares Corporation, supra*, the officers in *Re* Zier would have applied to their State Court. Of course had they rendered services which enured to the benefit of the estate, the Federal Court would have awarded them reasonable compensation under *Randolph* v. *Scruggs*, 190 U. S. 533.

In

*Bloch* v. *Bloch*, 86 N. Y. Supp. 1047

Mr. Justice Clark of the New York Supreme Court dealt with the precise question as in the case at bar within the scope of the cases falling in Groups III and IV, *supra* (pp. 21 and 22). The question in the Bloch case was whether the Court could make allowances to its own receiver after bankruptcy had intervened. The Court held at page 1050 in speaking of Mr. Justice Fuller's remark about "settling the accounts":

> "In view of the main purpose of the bankruptcy law, and the decisions rendered, I am of the opinion that the settlement of the accounts mentioned *does not mean the disbursement by the State Court of assets unadministered* at the time the proceedings in bankruptcy have been brought, a receiver thereunder appointed, and a demand for the property made. This Court may, upon motion duly made, settle the

> accounts of its receiver, recognizing such payments as were already properly made before the petition in bankruptcy was filed (Louisville Trust Co. *v.* Comingor, 184 U. S. 18) and upon transfer of all assets in possession to the bankruptcy court close his account, cancel his bond and discharge him and his sureties' from liability. The motion of the receiver in bankruptcy that the receiver in this suit (the State action) pay over the $10,000.00 in question to the receiver in bankruptcy is granted but without costs. Settle order on notice. Upon such payment the receiver in this suit may apply to this court for a settlement of his accounts and for his discharge."

It is submitted that the Court in the Bloch case clearly recognized that the bankruptcy jurisdiction was paramount and correctly applied the principle of the Watts case as was intended by this Court, both in the Watts case and in *Lion Bonding & Surety Co.* v. *Karalz, supra.*

## POINT IV.

### The power to fix fees after bankruptcy supervenes is exclusively in the Bankruptcy Court.

The best case on this subject and which reviews all of the cases on the subject is

*Re Diamond Estate,* 259 Fed. 70 (C. C. A., 6th).

The Court held:

> "Assuming that the action of the state court in respect to allowances to its receiver was presumptively correct and just, and that the bankruptcy court

will give due weight to this presumption, yet the ultimate determination of that question must, under the facts of this case, rest with the court of bankruptcy, taking into account equitable considerations and the extent to which the bankrupt estate has been benefited by the services and disbursements of the state court receiver. In re Watts & Sachs, *supra;* In re Zier & Co. (C. C. A., 7th), 142 Fed. 102, 103, 73 C. C. A., 326; Hume *v.* Myers (C. C. A., 4th), 242 Fed. 827, 830, 831, 155 C. C. A., 415; In re Neuberger (C. C. A., 2nd), 240 Fed. 947, 153 C. C. A., 633. Any other rule would, *pro tanto,* take the ultimate distribution of the assets of the bankrupt estate out of the hands of the bankruptcy court. We have no occasion to consider what the effect would have been had the state court fixed its receiver's compensation and allowances for merely the 18 days prior to bankruptcy. No action thus limited was had or asked and the superior court, as the court of appointment, has since surrendered any claim of control over the subject. As the case stands, orderly administration will be best effected by treating the entire period of service as a unit."

* * * * * *

"The pendency of proceedings in the state appellate court for review of the state court's action of November 21st, setting aside its previous order for compensation, is not and could not well be urged against the jurisdiction of the bankruptcy court. The commendable action of the state court last referred to terminated any conflict between the federal and state courts. The legality of that order and of its predecessors, as affecting the jurisdiction of the bankruptcy court, is one arising under the bankruptcy law, which it is our duty to decide."

This Court refused to grant a writ of certiorari *sub-nomine.*

*Frankenstein* v. *Jacobs,* 249 U. S. 614; 63 L. ed. 802.

This case established the following rules of law:

(a) *That the bankruptcy court is the only court that can fix fees after bankruptcy has supervened.*

(b) That summary proceedings are proper to recover moneys paid to state court receivers *after bankruptcy has supervened.*

This case was cited with approval in

*May* v. *Henderson,* 268 U. S. 111.

In this case assignees made payments before and after bankruptcy had supervened to a bank on account of an indebtedness due from the assignor to the bank. One of the assignees was the president of the bank. After bankruptcy supervened the referee made an order that the assignees account and turn over the moneys to the trustee in bankruptcy.

A similar procedure was adopted in the case at bar. The respondents were ordered to account and turn over the moneys they should have had but for the payments they made to themselves after bankruptcy had supervened.

In the case at bar the record indicates the receivers knew of the bankruptcy proceedings. As a matter of fact bankruptcy followed immediately on the heels of their appointment. No objection was made to the procedure. The respondents appeared and argued the merits. The language of Mr. Justice Stone, speaking for the Supreme Court, is therefore applicable.

"But property held or acquired by others for account of the bankrupt is subject to a summary order of the court, which may direct an accounting and a payment over to the trustee or receiver appointed by the bankruptcy court (citing cases)."

* * * * * *

"Such is the rule with respect to assignees for the benefit of creditors within four months of the filing of the petition (citing cases among them *Re Diamond, supra*)."

* * * * * *

"The several amounts debited to the account, with the assent or connivance of the assignee *subsequent* to the filing of the petition, fall clearly within the rule that, as to property in the hands of the bankrupt, or held by others for his account, 'the filing of the petition is a caveat to all the world and in fact an attachment and an injunction' * * * (citing cases). In consequence, any person acquiring an interest in property of the bankrupt or his assignee for the benefit of creditors, adverse to the creditors, *after* the filing of a petition, with notice of it, may be directed to surrender the property thus acquired by summary order of the bankruptcy court."

* * * * * *

"While it is now settled that the claim of an assignee for the benefit of creditors, of the right to charge in his account expenses incurred or expenditures made *prior* to the filing of the petition in bankruptcy, is an adverse claim which cannot be adjudicated in a summary proceeding (Louisville Trust Co. *v.* Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. 293, Galbraith *v.* Vallely, 256 U. S. 46, 65 L. ed. 823, 41 Sup. Ct. Rep. 415), we think the rule cannot be extended to a case such as this, where the claim is

merely colorable, and on its face made in bad faith and without any legal justification."

* * * * * *

"We rest our decision rather on the duty of assignees for the benefit of creditors to account in a summary proceeding for the property which they have received within four months of the bankruptcy, and to make restitution of the value of the property of the bankrupt which they have dissipated without a colorable claim of right."

We submit that this case fixes the rights of the petitioners. Their duty was to account to the Federal Court, turn over the assets to the trustee and apply for and receive their compensation from the Bankruptcy Court for preserving the estate.

See also

*Bryan* v. *Bernheimer,* 181 U. S. 188;
*In Re Williams,* 240 Fed. 788.

In

*Hume* v. *Myers,* 242 Fed. 827,

the question was the same as was presented in *Silberberg* v. *Ray Chain Stores, supra.* The issue was between a Federal Court sitting in Equity and the Bankruptcy Court. The Court held:

"The true rule is this: When a Court of Equity appoints receivers of corporate property, its allowance to its receivers and their attorney is an administrative order, presumptively right as to the justice of the allowance. When the corporate property falls by operation of law into the bankruptcy court, that court by comity will indulge the presumption in favor of the correctness of the allowance;

*but the court of bankruptcy having the responsibility of administration,* must exercise its independent judgment, giving due weight to the presumption in favor of the administrative finding of the Court of Equity. This, we think, is what the Supreme Court meant in the case of In Re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. ed. 933, when it said:

'It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its receiver, and close its connection with the matter. Errors, if any, committed in so doing, could be rectified in due course and in the designated way.'

*The rectification of errors in due course and in the designated way here referred to must mean rectification by the bankruptcy court, for after the assets are turned over to that court all orders relating to the matter must emanate from that court.*"

See also *Quemahoning Creek Coal Co.,* 15 Fed. (2) 58. In the case of

*In Re Rogers,* 116 Fed. 435.

the Bankruptcy Court refused to recognize that the State Court had the power to transfer the assets to the bankruptcy receiver or trustee encumbered by a lien on the assets to insure the payment of fees to the state receiver. The Court held:

"There are, however, considerations involved in this question which are far graver than the loss of assets in a particular case. They involve the supremacy of the constitution and laws of the United States, the power of congress to create a uniform

> system of bankruptcy, the legislation creating that system, and the settled principle that insolvency proceedings in state courts are suspended while the bankrupt law is of force. *It is the duty of a court of the United States to take care that by no judicial order of its own the effectiveness and vigor of the laws with the enforcement and administration of which it is entrusted shall be nullified and whittled away.*"

This disposes of the contention of the petitioners (p. 11 of petitioners' brief) that the State Court officers had something in the nature of a lien on the assets.

The reason why the bankruptcy court is the only court that may fix fees after bankruptcy supervenes is apparent. If we leave the power to fix fees in the State Court that court may destroy the entire bankruptcy act since the amount of fees that may be awarded is discretionary with the Court. It may be argued that no State Court would allow the entire estate to its receiver. But by analogy we refer to the doctrine that the State Government may not tax an instrumentality of the Federal Government. The reason was stated in

> *McCulloch* v. *The State of Maryland* 4 Wheat. 579, 17 U. S. Sup. Ct. Rep. 316.

> "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the

magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all government."

**The power in the State Court to fix fees unrestrained by any Bankruptcy Court is the power to destroy the Bankruptcy Act created by the Act of Congress under the Constitution.**

## POINT V.

**A State Court receiver is entitled to and will receive from the Bankruptcy Court just compensation and the repayment of his expenses for benefiting or preserving the bankrupt estate.**

The difficulty in reconciling the State Court to a recognition of the paramount jurisdiction of the Federal Court lies in their fear that their receivers will not receive payment for their services in the Bankruptcy Court or as much compensation as they would have received from the State Court. With the latter question we have no concern, because the Bankruptcy Act provides a schedule of fees. But ever since *Randolph* v. *Scruggs*, 190 U. S. 533, 539, 23 Sup. Ct. 710 (47 L. ed. 1165), the Federal Courts have paid State Court receivers and assignees for their necessary work and labor in connection with the preservation of the estate.

See also

*In re Chase*, 124 Fed. 753 (1903);
*In re Rogers* (*supra*).

In the case at bar the Federal Court both invited and directed the Chancery receivers and their counsel to seek their compensation in the Bankruptcy Court (Record, pp. 13, 20 and 23).

**Cases and Points Distinguished.**

The following are some of the cases and points relied upon by petitioners in their brief:

*Carling* v. *Seymour Lumber Co.*, 113 Fed. 483, page 491 (Certiorari denied) 186 U. S. 484, 46 L. ed. 1261;

*Ohio Motor Car Co.* v. *Eiseman Magneto Co.*, 230 Fed. 370 (p. 16 of petitioners' brief).

These two cases merely relate how the paramount jurisdiction should be exercised. They suggest that the trustee should not make a peremptory demand on the State Court receiver, but should do it politely. In view of the conflict in New Jersey, a polite request by the Federal Court would have been denied. (See orders in Appendix B, where the State Court refused to surrender the assets, as occurred also in the case at bar.)

*Loeser* v. *Dallas*, 192 Fed. 909 (C. C. A. 3rd) (p. 63 of petitioners' brief),

where the Court said:

> "In the nature of this an ancillary receiver must be subject alone to, and obey the orders of, that court of which he is an officer. So obeying, it follows that to it alone must he account."

An examination of the case shows that the conflict was between a trustee in bankruptcy and an ancillary receiver in bankruptcy. It was a conflict between officials of courts of the same general jurisdiction under the bankruptcy act which recognized ancillary proceedings. It was not a struggle between courts of superior and inferior jurisdictions.

*Mauran* v. *Crown Carpet Lining Co.*, 23 R. I. 344, 50 Atl. 387;

*Kennedy* v. *American Tanning Co.*, 81 N. J. Eq. 109;

*Shannon* v. *Shepard Mfg. Co.*, 230 Mass. 224, 119 N. E. 768.

These cases seem clearly overruled by *May* v. *Henderson, supra, In re Diamond, supra. Re Williams, supra,* definitely disapproves *Mauran* v. *Crown Carpet Lining Co.*

*Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 56 L. ed. 208.

This case rests either on estoppel or on the equitable doctrine of laches or on the specific finding of the Court that

> "The whole proceeding makes it clear that the district court *denied* the adjudication and declined to exercise its jurisdiction as a bankruptcy court."
>
> *Re Dayton Coal & Iron Co.*, 291 Fed. 390.

This case is relied upon extensively (pp. 16 to 18 of petitioners' brief) by the petitioners, and it will, therefore, be analyzed at length here. The essential question in the case was whether or not a decree made by a State

Court upholding the validity of a mortgage given by the corporation (later adjudicated bankrupt) was binding on the mortgagor's trustee in bankruptcy or, on the contrary, was subject to review by the Bankruptcy Court.

The Court held that the State Court's decree was binding on the trustee in bankruptcy and that the matter was not the subject of review by the bankruptcy court for the following reasons:

1. That the decree having been entered in the course of proceedings on "a general creditor's bill" was binding upon all general creditors of the mortgagor and was necessarily binding upon the trustee in bankruptcy as the representative of such creditors.

2. That the State Court decree in question was rendered "in the suit of an adverse claimant" to the (mortgaged) property and that that suit and the State Court's jurisdiction of the property involved therein were not affected by the bankruptcy proceedings because

> "The custody or constructive possession of the debtor's property which is vested in the bankruptcy court by the filing of the petition, *ex propria vigore*, extends, however, only to the property then held by or for him of which the Court might summarily take possession. * * * And it does not extend to property otherwise held as to which an adverse claimant has a substantial pre-existing claim of lien or title" (p. 396).

3. That the filing of a petition in bankruptcy "does not terminate the prior jurisdiction of a State Court in a suit to foreclose a mortgage."

Thereafter the Court proceeds "independently of the foregoing rules" to set forth views which are not necessary to a decision of the case, but on which they may rely. We shall therefore analyze them to show they do not apply. The Court says at page 398:

> "It is a general and fundamental rule of substantive law that a court which first acquires jurisdiction over property in controversy is entitled to retain that jurisdiction to the end of the litigation, without interference from any other court whatever, 3 Street's Fed. Eq. Pract., Sec. 2529, p. 1466."

As to this statement it is sufficient to say that the rule referred to is one which obtains only as between courts of *concurrent* jurisdiction and not as between courts of paramount and subordinate jurisdictions respectively, as where bankruptcy supervenes while a State Court receivership is pending. The Court next refers to certain language in the case of *In re Watts*, 190 U. S. 1, 23 S. Ct. 718, 47 L. ed. 933, wherein the Court seems to suggest that the said rule (which obtains between courts of *concurrent* jurisdiction) may have a "qualified application" where a State Court receivership is superseded by a bankruptcy proceeding, to the extent that such rule "still obtains as a rule of comity." As to this we beg leave to refer to pages 23, *et seq.* in our brief where we have fully discussed the *Watts* case and the language therein alluded to.

Next the Court refers to the case of

*Eyster* v. *Gaff*, 91 U. S. 524, 23 L. ed. 403,

as if that case held that a supervening bankruptcy had no effect upon the continuance of jurisdiction of a State Court whose receiver then had possession of the bankruptcy es-

tate. But that case lends no support whatsoever to that view. That case was an action in ejectment in which the plaintiff claimed title through a foreclosure of a mortgage. While the mortgage foreclosure suit was pending, a bankruptcy of the mortgagor supervened and the foreclosure decree was entered subsequently thereto. The defendant insisted "that all the proceedings in the foreclosure suit after the appointment of the assignee in bankruptcy are absolutely void, *because he was not made a defendant*" (See 23 L. ed. 404). The Court held that the State Court had jurisdiction to continue with the foreclosure proceeding after bankruptcy and to render a valid decree because "the debtor of a bankrupt or the *man who contests the right to real or personal property with him*, loses none of these rights by the bankruptcy of his adversary," and that although a (Federal) District Court which has adjudged a man bankrupt "draws to itself by that act * * *" *all control* of the bankrupt's *property* and *credits*, such bankruptcy does not draw into the Bankruptcy Court and out of other courts, litigation then pending in another Court relating to "*contested rights*" or "matters growing out of disputed rights of property or of contracts." In short, that decision was a vindication not of the jurisdiction of a State Court to control property of a bankrupt after supervening bankruptcy, but *the right of an adverse claimant* of property to continue to prosecute in a non-bankruptcy court his pending suit involving the *res*, despite the "bankruptcy of *his adversary.*"

The Court in the cited case next refers to the case of

*Jones* v. *Springer*, 226 U. S. 148, 33 Sup. Ct. 64, 57 L. ed. 161,

as if that case, too, lent support to the proposition that a bankruptcy proceeding does not terminate the jurisdiction of the State Court. In that case the suit was by a trustee in bankruptcy against an individual who had purchased property sold at judicial sale in a state court attachment proceeding, and the question before the United States Supreme Court was whether or not an order made by a state court in an attachment proceeding which ordered the attached property be sold "*on the ground that it was of a perishable nature and liable to be lost* * * * before the final adjudication of the case," was void and the sale made pursuant thereto invalid because, unbeknown to the State Court, a bankruptcy proceeding had supervened prior to the date of the said State Court order and sale. The Court held that it was not called upon to pass the question of the effect of the bankruptcy proceeding upon the jurisdiction of the State Court because "*whether it had jurisdiction or not* * * *" the State Court "had authority *from the necessity of the case* to preserve" the property in question "because the property was of *a perishable nature,*" the Court citing the language of Chief Justice Marshall to the effect that:

> "a right to order a sale is for the benefit of all parties, not because the case is depending in that particular court, but because the thing may perish while in its custody, and while neither party can enjoy its use" (see 57 L. ed. 164).

Next the Court (in the Dayton case) asserts that where bankruptcy has supervened, property in the hands of the State Court receiver "should not be taken from the receiver of the State Court by summary order or process of

the Bankruptcy Court, but in obedience to the rule of comity, application should be made to the State Court for an order directing its surrender," citing a large number of authorities in support of that statement. That proposition, we submit, may be conceded, but it is irrelevant. It means merely that the paramount bankruptcy jurisdiction should not be exercised brutally, but in a decent and orderly fashion by the making of an application to the State Court for an order directing its own receiver to surrender the assets *in recognition of the paramount bankruptcy jurisdiction.* Indeed, that proposition not only is consistent with the rule applied by the Court below in the case at bar, but acknowledges and presumes the existence of that rule.

Next the Court says:

> "In the light of the foregoing cases, I conclude that the prior jurisdiction acquired by a state court in a winding up proceeding, is not *ipso facto* superseded or suspended by the filing of a petition in bankruptcy, but that, as the state court cannot take judicial notice of the bankruptcy proceeding and is under the duty of proceeding in the case before it until informed of the changed relations of the defendant, it retains its jurisdiction in the winding up proceedings, under the rule of comity, until the pendency of the bankruptcy proceedings is brought to its notice and a request made to it by the bankruptcy court or a duly authorized officer thereof for the delivery of possession of the property of the defendant."

This conclusion, we respectfully submit, is not only unwarranted by the very authorities upon which the Court rests it, but is in itself untenable. It makes the question of the

State Court's continuance of jurisdiction after bankruptcy has supervened, depend on whether the State Court has been judicially informed of the bankruptcy proceeding or not, a proposition which, we submit, is a legal anomaly. If sound, it would mean that the paramount jurisdiction of the Bankruptcy Court attaches to property of the bankrupt in the hands of a State Court receiver *only if and when the State Court becomes judicially informed of the bankruptcy proceeding,* and it would make it possible for the Bankruptcy Act and the Bankruptcy Court's jurisdiction to be thwarted and defeated by a mere failure of interested parties judicially to apprise the State Court of the bankruptcy proceeding. We contend, however, that the efficacy and operation of the Bankruptcy Act does not rest on so precarious and casual a basis. The paramount jurisdiction of the Bankruptcy Court results from the filing of a bankruptcy petition and comes into existence in a given case the moment the petition is filed. See *Mueller* v. *Nugent, supra.* It does not await a communication of the bankruptcy proceeding to the State Court. It does not admit of a situation in which the jurisdiction of the Bankruptcy Court can be said to be a *jurisdiction in suspense.*

Immediately after making the statement last hereinabove quoted, the Court in the case under discussion goes on to say:

> "A contrary holding would, in my opinion be not only in conflict with the foregoing authorities and the rule of comity, but against a sound public policy. It would certainly lead to most disastrous results, to the wasting of the assets in fruitless litigation, and to great confusion, if, after the filing of the petition in bankruptcy the hand of the State court is to be deemed as stayed by the mere operation of law, so

> that when, without notice of the bankruptcy petition or any request of the bankruptcy court for the surrender of the assets, the State court proceeds in the due administration of the estate entrusted to its charge, adjudicating the rights of parties, selling and disposing of assets, and subsequently after an interval of months, or in case of contest and appeals, perhaps of years, an adjudication in bankruptcy is made, its jurisdiction is to be deemed to have been terminated, as matter of law, upon the filing of the petition and all its subsequent proceedings rendered thereby void."

As to this argument, grounded in an alleged public policy, we would remark:

1. In the case at bar the State Court receivers were notified in short order.

2. That it is not to be presumed that after a bankruptcy petition is filed, a State Court (in custody of the bankrupt's property) will, for any considerable time, remain in ignorance of that proceeding. Not only do all human probabilities and common sense expectancies preclude such a possibility, but the bankruptcy receiver, if one be appointed, would be under a duty immediately to take such steps as would be certain to acquaint the State Court with the fact of bankruptcy; or if no bankruptcy receiver were appointed the petitioners in bankruptcy or their attorney as well as interested creditors and other interested parties would be sure, in one way or another, to bring the matter to the attention of either the State Court or its receiver. If, however, such a remote possibility is to be entertained, it is an all-sufficient answer to say that the supremacy of the Fed-

eral law and the paramount jurisdiction of the Federal Courts thereunder can never be permitted to yield, if not in truth to abdicate, to an alleged "public policy" which is derived from so unlikely an abnormal and unrealistic an hypothesis as the one which the Court hereinabove postulates. If there is to be a choice between *upholding* the supremacy of the Federal constitution and laws and the paramountcy of the Federal Courts thereunder, at the risk of a remotely possible continuance of State Court administration in ignorance that its jurisdiction has lapsed because of bankruptcy, and the *overthrowing and abrogation* of the supremacy of the Federal constitution and laws thereunder in order to validate the post-jurisdictional action of a State Court, no one can doubt for a moment which alternative should and must be chosen. But secondly we would remark that if after supervening bankruptcy and in ignorance thereof, a State Court receiver were to sell and dispose of assets of the bankrupt estate, it does not follow that innocent third persons who dealt with the State Court receiver in good faith would be prejudiced by the rule which is applied in the case at bar. For, that rule, holding that the filing of a petition in bankruptcy terminates the jurisdiction and control of another Court over the bankrupt's property, does not necessarily operate to the prejudice or disadvantage of persons who have dealt with the receiver innocently and in good faith; for by analogy to Section 67-F of the Bankruptcy Law, it might still be held that with respect to such innocent third persons dealing with the receiver in good faith even after the filing of the bankrupt petition but in ignorance thereof, it might well and properly be held that their position and legal status would be regarded *as if* the State Court had had jurisdiction at the

time when their transaction or dealing with the State Court receiver took place.

However, we are prepared to argue that the rule in question is to be applied and the paramount Federal bankruptcy jurisdiction upheld even if it should operate to the prejudice and disadvantage of such third persons dealing with the State Court receiver *bona fide* and in ignorance of supervening bankruptcy; for even such persons are presumed to know that there is a Bankruptcy Law, that that law is constitutionally paramount, that bankruptcy may supervene at any time within four months after a State Court receivership, and that in dealing with a State Court receiver they are dealing with an officer of a Court whose jurisdiction and power is terminable and defeasible by a bankruptcy petition in the Federal Court. It may be argued that such persons deal with State Court receivers at their peril.

Finally and above all, it is incontestable that the Constitution and the laws thereunder must be upheld at all costs so long as those laws are in force, and it is the highest public policy to uphold those laws rather than defeat and thwart them. It is of the very nature of the dual system of government which obtains in our country that within the domain of Federal jurisdiction both the State Court and State government must subordinate and give way; and to say that State Court receiverships will be embarrassed or even defeated by upholding the Federal Bankruptcy Law is merely to state an inevitable consequence of the duality of our governmental system with its necessary incidents.

Our research shows that in *Re Dayton* has been cited in a number of cases but not in support of the proposition that

a State Court may fix fees after bankruptcy has supervened. These cases are:

*Butler* v. *Ellis*, 45 Fed. (2) 951 at page 954, (C. C. A. 4th), 1930;

*Scott* v. *Goodman*, 25 Fed. (2) 175 (1928), (recognizing *Lion Bonding Co.* v. *Karatz* as an authority);

*Re Conservative Mortgage & Guaranty Co.*, 24 Fed. (2) 38 (C. C. A. 6th), 1928, (citing also in *Re Diamond, supra*);

*Ft. Dearborn Trust & Savings Bank* v. *Smalley*, 298 Fed. 45 (C. C. A. 8th), 1924:

*Grand Rapids Dry Goods Co.* v. *Ostendorf*, 6 Fed. (2) 506 (C. C. A. 6th), 1925;

(the payment to a creditor was made in this case after the petition in bankruptcy had been filed);

*Iroquois Utilities, Inc.*, 297 Fed. 397 (C. C. A. 2nd), 1924;

(this case merely involved the foreclosure of a mortgage given more than four months prior to the filing of a petition in bankruptcy in which the District Court made an order directing the mortgaged property to be turned over to the trustee and enjoining the foreclosure suit. The Circuit Court reversed the order);

*Re Nebraska Hotel Co.*, 1 Fed. (2) 24 (C. C. A. 8th), 1924;

(where Point 1 of syllabus reads: "After bankruptcy petition was filed, purchaser at sale by receiver appointed by state court, which, with proceedings on which it was

based, were declared void by state Supreme Court, was not adverse claimant; state court having at no time acquired jurisdiction of *res.*") (This case is not in support of the claims of the petitioners herein).

In the petitioners' brief it is argued that the rights of a receiver in New Jersey are greater than that of an assignee; that not only has he possession but also title (page 25 of petitioners' brief); that the proceedings under the New Jersey Statute are in the nature of an equitable *quo warranto* (page 55 of petitioners' brief); that the receiver is an independent ego (page 56 of petitioners' brief); that the receiver is the corporation plus (page 57 of petitioners' brief), and that the receiver therefore is on a higher plane than a mere assignee who takes by the voluntary act of the parties.

It is true that the proceedings in New Jersey have been likened to an equitable *quo warranto* proceeding. As was pointed out by Vice-Chancellor Stevenson, the main object of the bill of complaint is not the appointment of the receiver, but the passing of an injunction to enjoin the corporation from exercising its privileges and franchises. Unless the Court grants the statutory injunction there is no jurisdiction to appoint the receiver as incidental relief. The granting of an injunction is an absolute condition precedent to the appointment of a receiver. See

*Gallagher* v. *Asphalt Co. of America*, 65 N. J. Eq. 258.

Since it is a suit against the corporation itself, how can the Court justify the injunction orders described in Appendix B against persons not parties to the suit?

That the receiver is not the corporation plus is manifest from the trend of recent decisions of the Court of Errors and Appeals, the Court of last resort in all causes in New Jersey. In the administration of the estate the receiver may become aggrieved at a decision of the Court of Chancery of New Jersey affecting the corporation's assets. If he is the corporation sole or the corporation plus or an independent ego, he should be permitted to appeal to the Court of Errors and Appeals as a matter of right because his property rights have been affected by the adverse decree. The Court has held, however, that the receiver may not appeal as of right but may do so only with the permission of the Court that appointed him.

*Crown* v. *Regna Construction Co.*, 106 N. J. Eq. 192 (Errors and Appeals 1930);
*Mortgage Security Corp. of N. J.* v. *Townsend*, 108 N. J. Eq. 268 (Errors and Appeals, 1931);
*Seidler* v. *Branford Restaurant*, 97 N. J. Eq. 531 (Errors and Appeals 1925) as to the status of a receiver.

This court has extended the law relating to assignees to receivers. *Stellwagen* v. *Clum, supra.*

In

*Bankshares Corporation of the United States*, 50 Fed. (2) 94 (C. C. A. 2nd) 1931,

the contentions of petitioner with respect to the status of a New Jersey receiver as to his title were fully considered and determined adversely to the contentions of the petitioner.

The Circuit Court of Appeals held as follows in disposing of this contention:

> "The New Jersey receiver as such has no standing to intervene in the District Court for the Southern District of New York. Moore *v.* Mitchell, 281 U. S. 18, 50 S. Ct. 175, 74 L. Ed. 673; Burrowes *v.* Goodman (C. C. A. 2), 50 Fed. (2) 92, decided May 18th, 1931. The injunction issued against the board of directors by the New Jersey Chancery Court does not extend beyond the jurisdiction of that court. The corporation had its principal place of business within the Southern District of New York, and the directors met there and passed a resolution authorizing its attorney to consent to the adjudication in bankruptcy. See Bonnifeld *v.* Thorp (D. C. Alaska), 71 F. 924. The Bankruptcy Act is paramount. In re Watts & Sachs, 190 U. S. 1, 23 S. Ct. 718, 47 L. Ed. 933. The New Jersey act is not in conflict with the provisions of the Bankruptcy Act. There is no provision of the Bankruptcy Act which exempts a New Jersey corporation from an adjudication thereunder merely because of insolvency proceedings resulting in a receivership, pending in the state of its creation. No state enactment may limit the jurisdiction of the bankruptcy court. International Shoe Co. *v.* Pinkus, 278 U. S. 261, 49 S. Ct. 108, 73 L. Ed. 318."
>
> * * * * * *
>
> "In Struthers Furnace Co. *v.* Grant, 30 F. (2) 576 (C. C. A. 6), the state court receiver sought to intervene for the purpose of vacating an adjudication in bankruptcy, and advanced the claim that the corporation had consented in the state receivership to bar itself from entering into a voluntary bankruptcy petition under section 4a of the Bankruptcy Act, 11 U. S. C. A. Section 22 (a). But this contention was overruled. In that case, the Ohio state

> statute for the appointment of a state receiver vested all the property of the corporation with such receiver, and the receiver was no mere custodian, but had full power to act for the corporation. Throckmorton's Ohio Code (1926), Section 11945, Rev. St. Section 5658; section 11897, Rev. St. 5590. A bankruptcy petition will supplant a state court receiver on application therefor. In re Dressler Producing Corp. 262 F. 257 (C. C. A. 2). The authorities appellant relies on, referred to above, are not inconsistent with these views."

See also

*In Yaryan Naval Stores Co.*, 214 Fed. 563 (C. C. A. 6th, 1914).

It is argued by petitioners "that the New Jersey Corporation Act so far as its insolvency features are concerned is not suspended by the Bankruptcy Act" (page 51 of petitioners' brief).

The New Jersey Courts however, have uniformly held that the statute in question is essentially a Bankrupt Act.

*In Bloch* v. *Bell Furniture Co.*, 111 N. J. Eq. 551, 162 Atl. 414 (1932),

the Court held:

> "The essentially bankrupt character of our statute concerning insolvent corporations was recognized by this court in Butler *v* Commonwealth Tobacco Co., 74 N. J. Eq. 423, 70 Atl. 319. The practical advantage of maintaining a harmonious doctrine in the administration of the assets of an insolvent corporation in the State and Federal Courts, where the provisions of our statute and the rationale of our jurisprudence permit, is apparent. Nutz

> *v.* Murray-Nutz, 109 N. J. Eq. 95, 156 Atl. 668. For one thing, it tends to avert an unseemly race for jurisdiction in the interest of one or another class of creditors. Napier *v.* People Stores Co., 98 Conn. 414, 120 Atl. 295, 33 A. L. R. 499."

In the Bloch case the New Jersey Court of Errors and Appeals adopted the bankruptcy rule as to the provability of claims for anticipatory breach of lease. Since it is a bankrupt act *it must follow that when bankruptcy supervenes the New Jersey Corporation Act insofar as the insolvency phases are concerned is immediately suspended.*

## POINT VI.

**The order of the District Court as affirmed by the Circuit Court of Appeals should be affirmed in all three cases.**

Respectfully submitted,

SAMUEL KAUFMAN,
Of Counsel with Respondent.

SAMUEL KAUFMAN,
NATHAN BILDER and
ARTHUR LEONARD ROSS,
of the New York Bar,
Of Counsel.

## Appendix A.

Section 65 of the Corporation Act, under which State Court receivers are appointed, reads as follows:

> "Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, or if its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, any creditor or stockholder, or stockholders, *provided* such stockholder or stockholders own at least ten percentum of the capital stock of such corporation, may by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the Court of Chancery for a writ of injunction and the appointment of a receiver or receivers or trustee or trustees, and the court being satisfied by affidavit or otherwise of the sufficiency of said application, and of the truth of the allegations contained in the petition or bill, and upon such notice, if any, as the court by order may direct, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter, or that its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, so that its business cannot be conducted with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts or paying out, sell-

ing, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the court, until the court shall otherwise order. (L. 1896, ch. 185, p. 298, Section 65 (C. S., p. 1640, Section 65), as amended by L. 1912, ch. 300, p. 535, Section 1; S. 47-65; as amended by L. 1931, ch. 221, p. 545.)"

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## Appendix B.

Types of injunction orders issued by the New Jersey Court of Chancery as described in the brief and all on file in the Docket in the office of the Clerk of the Court of Chancery of New Jersey.

(1) *Albert & Kernahan* v. *Monitor Park Theatre Co.*, Docket 70, page 352:

"That all persons stockholders of the defendant and firms or corporations including sheriffs and marshals and their officers, agents, attorneys, representatives, servants and employees, whether creditors or claiming to be creditors or having or claiming to have any right, title or interest of, in and to any property or properties of the defendant corporation, be and they hereby are enjoined and restrained from instituting or prosecuting or continuing the prosecution of any action instituted under and by virtue of the United States Bankruptcy Act, and the various amendments thereof and supplements thereto, without first giving the receiver herein appointed at least five days' notice of the institution, prosecution or continuing the prosecution of any such action, and at the same time serving upon the

said receiver copies of petitions, affidavits, orders and other pleadings intended to be presented or used thereon."

For a similar order see

*C. F. Albert Lumber Co.* v. *Kenvil Lumber & Store Co.*, Docket 76, page 16.

(2) *Tappen & Indruck Co., et al.* v. *Delpark, Inc.*, Docket 85, page 470:

"And it is further ORDERED that the said corporation, its officers, servants and agents are hereby restrained and enjoined from taking any corporate action for the purpose of having a receiver appointed for the defendant company in any other cause."

NOTE: (It is interesting to note that the defendant was a New York corporation. This order enjoined the corporation from exercising the privileges and franchise granted by the State of New York.) Compare *Rogers* v. *Guaranty Trust Co.*, 53 Sup. Ct. Rep. 295.

A petition in bankruptcy was filed in New York. The company consented to an adjudication and no contempt proceedings were brought in New York against the New York directors. In

(3) *Frank C. Zuch* v. *Atlas Fence Company*, Docket 95, page 226,

the order read as follows:

"AND IT IS FURTHER ORDERED, that until the further Order of this Court, all and singular the creditors and stockholders of said corporation, and all other persons whatsoever, be and they hereby are restrained from instituting, prosecuting or proceeding with any action in any court or tribunal whatsoever at law, in equity or in bankruptcy."

In

(4) *Benjamin* v. *Up-to-date Laundry Service, Inc.*, Docket 88, page 25,

the order read as follows:

"That the receiver herein until such time as the further order of this Court, retain in his possession all of the assets of said alleged bankrupt and do not surrender said assets to any trustee or receiver appointed in any Court of bankruptcy or to any officer of any other court or any person whomsoever without first having presented his report and account to this Court and having his account passed by this Court and his compensation fixed, the said receiver being authorized to retain said assets in his own right as an adverse claimant and in the right of this Court."

NOTE: (In this case the Court of Chancery ordered the assets sold after adjudication in bankruptcy; the receiver sold and delivered a bill of sale to his vendee.)

(5) *In the Matter of the alleged contempt of Frederick C. Henn, Spencer D. Baldwin and John M. Struble,* Docket 94, page 284,

the order read as follows:

"ORDERED, that Frederick C. Henn, Spencer D. Baldwin and John M. Struble show cause before the Chancellor at Chancery Chambers at 1060 Broad St., Newark, New Jersey, on the 7th day of January, 1933, at ten o'clock in the forenoon or as soon thereafter as the matter can be heard, why they should not be adjudged guilty of contempt of this court in the premises and punished accordingly."

NOTE: (In this case the contempt charged was a criminal contempt.)

For a similar order see

*Muller* v. *Mt. Holly Textile Co., Inc.*, Docket 94, page 691.

(In this case the contempt charged was a civil contempt.)

# SUPREME COURT OF THE UNITED STATES.

Nos. 680, 681, 682.—October Term, 1932.

Isaac Gross and Joel Gross, Partners as Gross & Gross, Solicitors for Complainant in Chancery, Petitioners,
680 *vs.*
Irving Trust Company, Trustee Crosby Stores, Inc., Bankrupt.

J. S. S. Weisman and John Milton, Receivers in Chancery of Crosby Stores, Inc., Petitioners,
681 *vs.*
Irving Trust Company, Trustee Crosby Stores, Inc., Bankrupt.

Isaac Gross and Joel Gross, Partners as Gross & Gross, and William Harris, Solicitors for Receivers in Chancery, Petitioners,
682 *vs.*
Irving Trust Company, Trustee Crosby Stores, Inc., Bankrupt.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 8, 1933.]

Mr. Justice Sutherland delivered the opinion of the Court.

October 13, 1931, the Court of Chancery of New Jersey, upon a bill of complaint previously filed, appointed receivers for Crosby Stores, Inc. The receivers took possession of the assets located in New Jersey and operated the business. On October 14, 1931, an involuntary petition in bankruptcy against the corporation was filed in a federal district court for the Southern District of New York, and the Irving Trust Company was appointed receiver in bankruptcy by that court. The corporation was adjudged a bankrupt, and the trust company was continued as trustee

in bankruptcy and later sold all the assets of the bankrupt, including those which had passed into the hands of the New Jersey receivers. On December 11, 1931, the federal district court ordered the New Jersey receivers to show cause (rule made absolute December 14) why they should not turn over all the assets to the trustee in bankruptcy and account to the federal court. On December 14 the state chancery court made allowances to its receivers and their counsel in sums aggregating $10,350. Subsequently (December 21, 1931), the federal district court enjoined the receivers from interfering with the trustee and from disposing of the moneys paid to them as allowances under the order of the state chancery court.

The trustee then filed its petition in the federal district court, sitting as a court in bankruptcy, averring that the payments to the receivers were void as in violation of the bankruptcy act, and that application must be made to the bankruptcy court for allowances of compensation for any services rendered by the receivers and their counsel inuring to the benefit of the bankrupt's estate. An appropriate order was asked against the receivers and their counsel and was granted by the federal district court, and affirmed by the circuit court of appeals. 61 F. (2d) 812. This court granted certiorari.

The sole question presented for our determination is: Did the state chancery court have the power to fix the compensation of its receivers and their counsel after bankruptcy had supervened within four months of the filing of the bill of complaint in, and the appointment of receivers by, that court?*

The state courts of New Jersey have steadily held in the affirmative, and that view is not without support. We deem it unnecessary, however, to review these decisions. They are not in harmony with the views expressed by this court or with other decisions, which, in our opinion, state the true rule.

Upon adjudication of bankruptcy, title to all the property of the bankrupt, wherever situated, vests in the trustee as of the date

*The decision of the circuit court of appeals is assailed as erroneous upon the further ground that that court held that the district court had power to proceed in a summary proceeding in bankruptcy, although the receivers and their counsel were adverse claimants. We do not consider this contention, because it appears from the record that the point was abandoned in the district court.

of filing the petition in bankruptcy. The bankruptcy court has exclusive jurisdiction, and that court's possession and control of the estate cannot be affected by proceedings in other courts, state or federal. *Isaacs* v. *Hobbs Tie & T. Co.*, 282 U. S. 734, 737, and cases cited. Such jurisdiction having attached, control of the administration of the estate cannot be surrendered even by the court itself. *Id.*, 739. "The filing of the petition is a caveat to all the world and in fact an attachment and an injunction." *May* v. *Henderson*, 268 U. S. 111, 117, and citations. And see generally *Moore* v. *Scott*, 55 F. (2d) 863; *In re Diamond's Estate*, 259 Fed. 70.

The fact that the jurisdiction of the bankruptcy court is paramount effectually distinguishes that class of cases which hold that as between courts of *concurrent* jurisdiction property already in the hands of a receiver of one of them cannot rightfully be taken from him without that court's consent by a receiver subsequently appointed by the other court. In *Buck* v. *Colbath*, 3 Wall. 334, 341, the rule is stated to be that "whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, *or some superior jurisdiction in the premises.*" And see *Covell* v. *Heyman*, 111 U. S. 176, 180. The present case falls within the italicized exception, since the jurisdiction of the bankruptcy court is paramount and not concurrent.

Nevertheless, due regard for comity—which means, in this connection, no more than judicial courtesy between the courts undertaking to deal with the same matter—would suggest that ordinarily the trustee in bankruptcy might well be instructed by the bankruptcy court, before taking final action, to request the state court to recognize the exclusive jurisdiction of the former and set aside any orders already made conflicting therewith, as was done with good results in the case of *In re Diamond's Estate, supra*, pp. 72, 75. In the present case, however, such a course would probably have been futile, in view of the fixed attitude of the state courts on the subject.

The jurisdiction of the bankruptcy court being paramount, the power of the state court to fix the compensation of its receivers and the fees of their counsel necessarily came to an end with the super-

vening bankruptcy. When the bankruptcy court acquired jurisdiction, the sole power to fix such compensation and fees passed to that court. *In re Diamond's Estate, supra,* 74; *Moore* v. *Scott, supra; Silberberg* v. *Ray Chain Stores,* 54 F. (2d) 650, affirmed, 58 F. (2d) 766. We adopt, as stating the correct rule, the language used in *Lion Bonding Co.* v. *Karatz,* 262 U. S. 640, 642, although it was not strictly necessary to that decision: "Even where the court which appoints a receiver had jurisdiction at the time, but loses it, as upon supervening bankruptcy, the first court cannot thereafter make an allowance for his expenses and compensation. He must apply to the bankruptcy court." See authorities cited in the footnote following this statement.

*Order affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*